IN THE

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL CIRCUIT

ALASKA PACIFIC RAILWAY & TERMINAL COMPANY, a corporation,
Plaintiff and Appellant,

vs.

THE COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation; KATALLA COMPANY, a corporation, and M. K. ROGERS, *Defendants and Appellees.*

No. 1491

Appeal from the District Court for the District of Alaska, Division No. 1.

BRIEF OF APPELLANT

HAROLD PRESTON,
SHACKLEFORD & LYONS and
F. M. BROWN,
Attorneys for Appellant.

Lowman & Hanford Stationery and Printing Co., Seattle, Wash.

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STATEMENT OF THE CASE.

This is an action brought by the appellant, Alaska Pacific Railway & Terminal Company, against the appellees, The Copper River & Northwestern Railway Company, The Katalla Company (a company engaged in construction work for the Copper River & Northwestern), and

M. K. Rogers (chief executive agent of the Copper River & Northwestern Railway Company and the Katalla Company), in which the plaintiff company sought to procure an injunction *pendente lite* to prevent the defendants from forcibly entering, laying a track upon and crossing the right-of-way of the plaintiff company, and a certain terminal tract situated upon the shores of Controller Bay, an open roadstead of the North Pacific Ocean, in the Gulf of Alaska. This appeal is an appeal from a certain order made and entered on the 12th day of June, 1907, denying the plaintiff's application for injunction *pendente lite*, and the appeal is taken pursuant to the provisions of the act of June 6th, 1900, chapter 51, 31 Statutes at Large, page 414, being an act providing for a civil government in the District of Alaska.

A glance at the map of Alaska shows a large river, known as the Copper River, running in a southerly direction from the interior of Alaska, and emptying into the Gulf of Alaska west of the 144th meridian. A further examination of the map will show that the delta of this river covers a considerable expanse of territory in longitude and that there are no bays or havens in the vicinity of the delta of this river except such as are situated on Prince William Sound to the west of the Copper River delta. To the east of this delta, and in the vicinity of Kayak Island, and of a point on the southerly end of Kayak Island known as Cape St. Elias, and which point was the original discovery point of Behring on his first voyage in 1741, there is an open roadstead denominated on the government maps as Controller Bay. Within the navigable limits of this roadstead there is no protection whatever from the ocean swells to the southward or the prevailing southeasterly winds, save such as is given by two small islands within a few hundred feet of the mainland, which islands are

known as Outer and Inner Martin Islands. Inner Martin Island is sometimes denominated as Whale Island, is situated only a few hundred feet from the high tide line on the mainland, and is connected with the mainland by a reef or neck which is exposed at low tide. (See Record, p. 9 and 10.)

The Copper River (which is one of the largest rivers in Alaska) has been known by that name, either in Indian, Russian or English, for approximately one hundred and fifty years, the Indian word "Chytina," when translated into English meaning "copper." Two facts important to the permanent development of Alaska, and almost equally as important to the entire Northwest Pacific Coast, have transpired within the last seven years. The first of these is that in 1900 the copper, for which this river has so long been famous, and for which this river has carried the name "Copper," was first definitely located by the discovery of the "Bonanza lode," litigation concerning which was before this court in the case of *Copper River Mining Co. vs. McLellan,* 138 Fed. 333, in which the company which subsequently sold this lode to the Guggenheims prevailed. The second fact was the discovery in 1901-2 of ample deposits of semi-anthracite coal immediately north of the Martin Islands, and some fourteen or fifteen miles inland.

On the 4th of May, 1905, plaintiff company was organized for the purpose of constructing a railroad, which railroad was to have its terminals upon the property in controversy in this case, and establish its wharf upon the Inner Martin (or Whale) Island heretofore mentioned. On the 8th of May, 1905, the plaintiff company filed its articles with the secretary of state at Olympia, Washington, and among other things it was provided in the articles that the company was organized for the purpose of laying

out, furnishing and equipping a railroad "from a point on the northern end of Martin's Island, in the District of Alaska, by some practicable, convenient route, in a northerly direction from the Pacific Ocean, or some bay or inlet thereof; also to extend, lay out, construct, furnish and equip said railroad line and railroad from said point at or near the northerly point of Martin's Island * * * as may hereafter be determined upon by said corporation." (See Defendant's exhibit No. 12; record, p. 458.) And thereafter, on the 23rd of January, 1906, a copy of said articles of incorporation, duly certified, was filed with the register and receiver of the United States land office at Juneau, Alaska. (See agreed statement of facts, record, p. 278.) In the months of June, July and August, 1905, Mr. S. A. D. Morrison, of Pittsburg, Pennsylvania, the vice-president and general manager of the plaintiff company, visited Katalla, Alaska, with a crew of engineers, and, pursuant to previous determination of the company, caused a survey to be made of Inner Martin Island, which survey was denominated Terminal Tract No. 1A, and caused a survey to be made of forty acres of ground immediately north of Inner Martin Island for a terminal yard, and caused a preliminary survey of the first fourteen miles for the right-of-way of a line of railroad from Inner Martin Island to the coal fields on Bering Lake to be made. The exterior boundaries of the forty-acre terminal tract No. 1B were plainly marked upon the ground, and the employees of the plaintiff company were upon and in the vicinity of the said forty-acre tract for a number of days during this summer. (See affidavits of Morrison, Bruner and Hampton, record, pp. 11, 212, 230 et seq.) Previous to this time, and in the month of December, 1904, one Peter F. Byrne, of Spokane, Washington, had determined that the position of what is now Terminal Tract No. 1B

was advantageous in view of the immediate proximity of the Martin Islands, and in the month of December, 1904, had caused a survey to be made of a large portion of the property in controversy under the soldier's additional homestead script act by one Charles E. Davidson, U. S. deputy surveyor. At the time Mr. Morrison visited the vicinity of the Martin Islands in 1905, it appears that this survey had already been made and was subsequently approved by the surveyor general for the District of Alaska as non-mineral ground; (see plat of Byrne entry, plaintiff's exhibit 7, record, p. 114 et seq.), and prior to the survey of Terminal Tract No. 1B the plaintiff company, through Mr. Morrison, purchased from the said Peter F. Byrne a relinquishment of all his rights under the said soldier's additional survey, and paid therefor the sum of $1,000.00, which relinquishment was filed in the United States land office at Washington, D. C. (See Morrison's affidavit, record, p. 238.)

Some four and a half years previous to the first survey of the plaintiff on the terminal tract and its first fourteen miles of right of way, viz., in the month of December, 1901, it appears that a number of notices of location for oil claims, purporting to be in the vicinity of this terminal tract, had been filed with the United States commissioner for record, and it is claimed, and may be conceded for the purposes of this case, that two certain location notices, to-wit, the "Standard Oil" and "Oil King" location notices, included within the descriptions upon their face the property now surveyed and marked and known as Terminal Tract No. 1B. There is no evidence in the record in this case that a *bona fide* discovery of oil was ever made upon the property in controversy. It is apparent that at the end of these four and one-half years, when Mr. Morrison visited the property, the ground included within the exterior boundaries of Terminal Tract No. 1B, and the ground

in the vicinity thereof, bore upon its face no evidence whatever of assessment work for oil or other mineral purposes. (See affidavits of Hampton, Morrison and Bruner, record, pp. 231, 216, 13, 14.) It is also evident that no improvements appeared upon the face of the ground, save and except such as had been constructed there in the shape of abandoned cabins some twenty years previous to the entry of the plaintiff company upon the ground. (See affidavits of Morrison, Bruner and Hampton, record pp. 233, 217, 11.) The defendants in this case filed at the hearing an abstract of certain blanket affidavits of labor, sworn to by persons who were not put under the obligation of an oath in this case; but it will be conceded that the abstract contained no affidavits of labor whatever for the year 1906 or for the year 1907. In the month of September, 1905, the plaintiff company caused a survey to be made of the harbor facilities with reference to the accessibility of Inner Martin or Whale Island to ocean-going vessels, and found conditions favorable for this purpose. (See affidavits of Hampton, record, p. 8.) Between the second of September and the 31st of October, 1905, W. H. Hampton, chief engineer for the plaintiff company, surveyed from Bering Lake through a pass known as Charlotte Lake Pass to the Copper River above the delta, making the preliminary surveys upon the main line of the road, exceed considerably at that time a distance of twenty miles from the starting point, to-wit, Inner Martin Island. (See Hampton's affidavit, record, p. 41, and plaintiff's exhibit No. 19, being the survey of line from 14-mile point to the Copper River.) On the 13th of February, 1906, the commissioner of the general land office rejected the original articles of the plaintiff company for the reason that the same did not designate the northern terminus and the general course of the line of road to the north of the Controller Bay country,

(see agreed statement of facts, record, p. 279), and ruled in accordance with the decision of the Supreme Court of the United States in the case of *Washington & Idaho Railroad Co. vs. The Coeur d'Alene Railroad Co.,* 160 U. S. 77, that the railway act pertaining to Alaska, approved May 14th, 1898, (which was identical in its terms with the act of 1875 under consideration in the Coeur d'Alene case just above mentioned) required that the general course and termini of the railway should be stated in the articles of incorporation, which the act required to be lodged with the secretary of the interior as a condition of acquiring the right-of-way and other privileges of the railway act. On the 24th of February, 1906, the plaintiff company duly amended its articles of incorporation to conform with the ruling of the honorable commissioner of the general land office, and with the ruling of the Supreme Court of the United States above referred to, and in the articles it was provided as follows:

"To lay out, construct, furnish and equip a railroad line and railroad from a point on Whale or Inner Martin Island, in Controller Bay. in lat. 60° 9′ north, long. 144° 44′ west; then in a northerly direction along the shore of Controller Bay up Katalla River, across and along the shore of Behring Lake, up Shepherd Creek, over and up Copper River to and across the Tanana River and to the Yukon River to or near Eagle City, a distance of about four hundred and fifty miles."

Otherwise the articles are identical with the original articles adopted by the company on the 4th of May, 1905. Thereafter, on the 6th day of April, 1906, the articles as amended in conformity with the ruling of the honorable commissioner of the land office were duly filed with and accepted by the secretary of the interior, in accordance with the provisions of the railway act. On the 28th of

April, 1906, a corrected preliminary survey, showing the line of route for the first fourteen miles of the plaintiff company to Behring Lake, and showing on its face the location and situation of Terminal Tract No. 1A on Inner Martin Island, and 1B on the mainland immediately north thereof, were returned by the commissioner of the general land office with instructions to the register and receiver at Juneau to have the preliminary survey of the first fourteen miles corrected in certain respects, and to have the survey of Terminal Tract No. 1A amended. (See commissioner's letter, plaintiff's exhibit 6, record, p. 372.) The commissioner found no objections whatever to the survey of Terminal Tract No. 1B, and in his letter used the following language:

"There are no objections to the granting of the right-of-way of Terminal Tract No. 1B, but as it is one of definite location adjacent to preliminary survey of the line of the road, no action in regard thereto is necessary until a map of definite location of the lines of road has been filed."

On the 28th of April, 1906, the preliminary survey of the second division of the road, to-wit, from Behring Lake up to the Copper River, was duly accepted for filing by the Department of the Interior. (See said map, plaintiff's exhibit 19, p. 141, and endorsements thereon.) In the month of June, 1906, the season for open work, including surveying, having commenced, plaintiff company entered upon Terminal Tract No. 1B and established a survey camp thereon, and maintained the same throughout the open season of 1906, and from the 24th day of June to the 4th of October, 1906, Hampton, the chief engineer of the plaintiff company, with a crew of engineers, surveyed the definite location of the plaintiff company's right-of-way from the property in controversy past Behring Lake and northward,

a distance of twenty miles from the initial point at Inner Martin Island. All of the surveying in this connection in the vicinity of the property in controversy was done by the plaintiff company in the month of June, 1906, and the map of definite location was made in accordance with this survey and bore on its face the representation of Terminal Tract No. 1A and No. 1B, showing their location on the ground with reference to the right-of-way. (See map of definite location, being plaintiff's exhibit No. 1.)

The preliminary and definite surveys of the defendant companies in the vicinity of Controller Bay, as shown by their sworn certificate and as admitted by defendant Rogers, were not made until subsequent to the first of September, 1906, some three months after Hampton had completed his survey in the neighborhood of the property in controversy. On the 2nd of July, 1906, the preliminary survey of the first fourteen miles of the plaintiff company was duly accepted for filing (the same having been amended as required by the letter of the commissioner of April 28th, 1906,) and the same was duly filed in the general land office at Washington, D. C. (See plaintiff's exhibit 4; see record, p. 116.) On the 20th of December, 1906, the map of definite location of plaintiff company, in accordance with the survey made from June 24th to October 4th, 1906, was filed, as required by statute, in the United States land office at Juneau, Alaska, and exhibited on its face the definite location of the right-of-way for the first twenty miles and the location of Terminal Tract No. 1A on the Inner Martin Island and Terminal Tract No. 1B immediately north thereof on the mainland. Thereafter, on the 18th of March, 1907, the plaintiff's map of definite location was marked "Approved," and the approval signed in person by the Hon. James A. Garfield, secretary of the interior. (See agreed statement of facts, record, p. 281,

and see *fac simile* of Secretary Garfield's signature on plaintiff's exhibit 1.) Subsequently, and on the 28th day of March, 1907, the commissioner of the general land office wrote a letter to the register and receiver of the local land office at Juneau, Alaska, returning the map of definite location, together with the duplicate, to have certain clerical errors which were apparent on the face of the engineer's certificate corrected to conform with the courses and distances shown on the approved profile. These errors were duly corrected prior to the hearing in this cause, and the map returned to the local land office at Juneau, Alaska, in accordance with the commissioner's request.

We revert now to the sequence of events connected with the operations of the Copper River & Northwestern Railway Company in connection with its surveys in the vicinity of Controller Bay. In the first place, the Copper River & Northwestern Railway Company was organized for the purpose of constructing a line of railway from a point at or near Valdez, in the District of Alaska, to a point at or near Eagle City on the Yukon River. (See plaintiff's exhibit No. 21, record, p. 394, articles of incorporation of the Copper River & Northwestern Railway Company.) It is to be noted from an examination of the maps that Valdez is situated some 100 miles west of the Copper River delta, and far distant from any point on Controller Bay. It is located on the enclosed waters of Prince William Sound. The Copper River & Northwestern Railway Company, as appears from its articles of incorporation, was organized with the view of establishing a terminus in protected waters, and before the proximity to the coal fields became apparent as a necessity in the construction of this road. As shown by Mr. Rogers' testimony (see record, p. 46), the main object of the Copper River & Northwestern Railway Company was to construct a railroad from tide water

to the region of the Bonanza lode claims, or the copper field at the confluence of the Chytina with the main stream of the Copper River. Indeed, the Copper River & Northwestern Railway Company made its first definite location of twenty miles of road, together with its terminal tract location, at Valdez, Alaska. (See plaintiff's exhibit 5, being map of definite location; see also record, p. 119, being statement introducing the map of definite location from Valdez to the head of Keystone Canal.) It was over a year after the plaintiff company decided to locate its line of railroad on Controller Bay that Controller Bay became a point attractive to the Copper River & Northwestern Railway Company as a Pacific Ocean terminus. Mr. Rogers, the present chief engineer of the defendant, the Copper River & Northwestern Railway Company, states in his evidence (see record, p. 44 et seq.), that early in the spring of 1905 he was instructed by the Copper River & Northwestern Railway Company to visit the District of Alaska and examine all of the proposed railroad routes surveyed by his predecessors in office, and surveyed by other companies in which the Copper River & Northwestern Railway Company were not interested, and was further instructed to determine and report upon the most feasible route from tide water to the confluence of the Copper River and Chytina, and to report upon the most feasible point for terminal on the Pacific Ocean in connection with the operation of the road. After examining the route theretofore established by the Copper River & Northwestern Railway Company from Valdez, and examining the routes of the various other companies who projected roads into the interior, he reported that the railroad should be built from a point on Controller Bay, known as Palm Point, about a mile to the eastward of the property in controversy in this action. He reported that the defendant company

should construct at this point an artificial harbor by means of a stone breakwater, and build from that point up the shores of the Pacific Ocean, up the Copper River delta and up the Copper River. (See Rogers' testimony, record, p. 46.) He also advised the construction of a line of road practically paralleling and involving longitudinal crossings of the plaintiff's road in the vicinity of Behring Lake. Some two months and a half after Hampton's survey of definite location in the vicinity of Controller Bay he caused his lines of preliminary location to be laid across the center of Terminal Tract No. 1B, and across the plaintiff's right-of-way at that point. He also caused preliminary survey to be made practically identical with the plaintiff's definite line of survey, up past Behring Lake and over Charlotte Lake Pass, and thereafter the Copper River & Northwestern Railway Company purchased the rights of a certain railway company, known as the Copper River Railway Company, from Charlotte Lake down into the Copper River valley, which rights the Copper River & Northwestern Railway Company still lay claim to. (See Rogers' testimony, record, pp. 75, 78.) These two lines of route therefore give to the defendants an option of reaching the Copper River valley either by way of Charlotte Lake Pass or by way of the Copper River delta. The route by way of Charlotte Lake Pass from Palm Point gives them an optional entrance into the Copper River valley which does not pass anywhere in the vicinity of the property in controversy, being the property immediately north of Inner Martin Island.

It appears from the record in this case that the Copper River & Northwestern Railway Company has never adopted any other Pacific Ocean terminus, or any Pacific Ocean ed any Pacific Ocean terminus other than Valdez, as originally adopted; that they have never sought to conform

with Mr. Rogers' recommendations in the premises by lodging with the secretary of the interior the amended articles of incorporation which would change their Pacific Ocean terminus from Valdez to Controller Bay.

The plaintiff company was in the peaceable possession of Terminal Tract No. 1B, and the right-of-way in the vicinity thereof, in the early spring of 1907, and at the date of this hearing had expended some $250,000.00 for equipment, supplies, labor, etc., upon the survey and construction of their line of railroad. A large number of their employees were all during the spring 1907 occupying permanent buildings upon the property in controversy. (See affidavits of Bruner, Morrison and Hampton, record, pp. 230, 209, 15.) Subsequent to the approval of the plaintiff's definite survey for its first twenty miles, the Copper River & Northwestern Railway Company threatened to enter by force with a large number of men and proposed to construct a line of railway from east to west across the center of Terminal Tract No. 1B, and across the right-of-way and the proposed yards of plaintiff company immediately to the north of their wharf site on Inner Martin Island. Thereupon the original complaint in this case was filed in the District Court for the First Division of the District of Alaska, and a motion was made for the issuance of an order to show cause against the defendants, and for a restraining order restraining them in the meantime from entering upon the property in controversy, being the tract immediately north of Inner Martin Island. This application was based upon the affidavit of S. A. D. Morrison, filed on the 9th day of May, 1907, and upon the complaint setting forth the location and occupation of Terminal Tract No. 1B, and setting forth the approval of the definite survey, which included upon its face the surveys of Terminal Tract No. 1B. Thereafter, and on the 11th of May,

1907, S. A. D. Morrison filed his further affidavit herein, exhibiting to the court the fact that he had been advised that the plaintiff had the right to defend its possession of the ground in controversy by force, if necessary, and setting forth the fact that there was every reasonable prospect of a physical conflict over the possession of the same. The affidavit further set forth the fact that communication between Controller Bay and Juneau was such that the parties could not be brought before the court prior to the 4th or 5th of June. On the 25th of May, 1907, a telegram was filed in this cause from F. M. Brown, an attorney of this bar, showing that a conflict between the parties over the ground in controversy was imminent and the condition at Katalla serious. The court on the 13th of May, 1907, issued an order to show cause, requiring the defendants to appear and show cause why an injunction *pendente lite* should not be granted, but absolutely refused any relief upon the *ex parte* application. Between the time when the complaint was originally filed, and the cause came on for hearing on the 8th of June, the employees of the Copper River & Northwestern Railway Company had entered upon the property in controversy and a physical conflict had occurred. The pile-driver of the Copper River & Northwestern Railway Company had become incapacitated for use, and the attack upon the property in controversy from the easterly side had ceased for a time, but the defendants were continuing in blasting and entering upon the property in controversy from the westerly side thereof. (See affidavit of F. M. Brown, record, p. 265; affidavit of Thomas Dwyer, record, p. 292; affidavit of M. W. Bruner, record, p. 209.) And the complaint in this case was amended accordingly so as to set out the physical occupation of the property in controversy by the defendants. In the meantime it had transpired that in addition to the map of

Terminal Tract No. 1B, as the same appeared on the line of definite location which had been approved by the secretary of the interior, there was a separate plat of the terminal tract on an enlarged scale, upon which the secretary of the interior's endorsement of approval had not been placed, and plaintiff, although contending that the approval of the definite survey approved not only the right-of-way for the road, but the easement of the terminal tract, amended its complaint so as to seek an injunction not only against the crossing of Terminal Tract No. 1B, but against the crossing of the right-of-way in the vicinity thereof, so that the court would have before it as a separate proposition the right of the defendants to enter upon the right-of-way as approved by the secretary of the interior. According to stipulation only two witnesses were examined orally—W. H. Hampton, chief engineer for the plaintiff, and M. K. Rogers, chief engineer for the defendant, the Copper River & Northwestern Railway Company. All of the other evidence in the case was adduced by the introduction of maps, plats, records, affidavits and by means of a statement of certain facts which were agreed upon between counsel.

The defendants answered the plaintiff's complaint, and tendered four affirmative defenses.

First, that the defendant, the Copper River & Northwestern Railway Company had located a right-of-way for a railroad across plaintiff's Terminal Tract No. 1B, and across the right-of-way of the plaintiff north of Inner Martin Island, as alleged by the plaintiff, and as indicated by the plat attached to the plaintiff's complaint, and alleged that it had in all respects complied with the rules and regulations prescribed by the secretary of the interior relative to the acquisition of rights-of-way for railroads in the District or Territory of Alaska, and alleged the location,

on the 23rd of November, 1901, of certain placer oil claims covering the ground designated as plaintiff's Terminal Tract No. 1B, and alleged that W. E. Abernethy, M. W. Bruner, *and the other locators* of the said placer oil claims had conveyed the said mineral claims to the Alaska Petroleum & Coal Company, and that said Alaska Petroleum & Coal Company had been in the open and exclusive possession of said oil claims until forcibly dispossessed by the plaintiff, and alleged that said Alaska Petroleum & Coal Company had sold and conveyed to the Copper River & Northwestern Railway Company a right-of-way for a railroad across said oil claims, and alleged that the property in controversy was not public land open to location by railroad companies for right-of-way for terminal grounds. No proof was introduced in the cause to show that more than an undivided five-eighths of the original interest of the locators had been conveyed to the Alaska Petroleum & Coal Company, or the defendants or any of them. No evidence was introduced in support of the allegations of the answer to the effect that the defendants had complied with the laws and regulations of the Department of the Interior relating to the acquisition of property for railroad purposes by filing proper articles of incorporation. No evidence was introduced to show the existence of any improvements or the doing of any assessment work within the last few years upon the placer oil claims or at a point nearer than three miles from the property in controversy.

The answer tendered a second and affirmative defense, in which it was alleged that the property (Terminal Tract No. 1B) is located between the Pacific Ocean and a range of mountains to the northward thereof, and that the point at which the same is located constituted a canyon, pass or defile.

The answer tendered a third separate and affirmative

defense, to the effect that the map and field notes of the survey covering Terminal Tract No. 1B had not been approved by the secretary of the interior, and a fourth affirmative defense that the plaintiff corporation had not complied with the laws of the State of Washington, in that the whole of the capital stock of the plaintiff company had not been subscribed.

The reply denied all the affirmative allegations of the answer, and in order to specifically raise the issue, after denying that defendants had complied with the law and rules of the Department of the Interior relating to the acquisition of right-of-way by railroads, specifically set up that the defendant Copper River & Northwestern Railway Company was organized for the purpose of constructing a line of railroad from Valdez, in the District of Alaska, to a point at or near Eagle City, and that the articles of incorporation had never been altered, changed or modified, and that the defendant company had elected to make its Pacific Ocean terminus at Valdez, in the District of Alaska, and had definitely located its terminus at that point in the manner provided by the railway act of May 14th, 1898.

After a hearing of several days and thorough argument in the premises, the court rendered its opinion, which was transcribed and made a part of the record in this case. To this opinion we invite the careful consideration and attention of the court.

It appears from the supplemental complaint on file in this action (see record, p. 336), that since the refusal of the court to grant the injunction *pendente lite*, the defendant railway company constructed a set of blockhouses in the vicinity of the easterly boundary of the property in controversy, placed armed men therein with rifles, and by means of a superior force of men entered upon Terminal

Tract No. 1B after a serious physical conflict, and constructed a line of railway across the said terminal tract, and are now maintaining possession of a portion of the said terminal tract.

SPECIFICATIONS OF ERROR.

The assignments of error contained in the record are numerous. They relate in part to the introduction of certain incompetent testimony on behalf of the defendants, and they relate to various phases of the Court's ruling. It will be necessary in this brief, however, to specify only the following errors, so that complete argument of the main question involved may be had:

I.

That the Court erred in deciding and holding that the defendant, the Copper River & Northwestern Railway Company could enter upon the right-of-way and within 100 feet on each side of plaintiff's main line of survey as shown by its approved map of definite location, without any previous proceedings in court for the condemnation of a crossing of the plaintiff's right-of-way, or for a judicial determination of where said crossing should be.

II.

That the Court erred in holding that the defendants could enter upon and cross Terminal Tract No. 1B, described in the plaintiff's complaint, while the plaintiffs were in possession of the same, without previous proceedings for condemnation of a right-of-way across the same, and without having first obtained a judicial determination as to the necessity of the said crossing.

III.

That the Court erred in holding that the defendants could justify their forcible encroachment upon the ground in controversy, being Terminal Tract No. 1B, and the right-of-way in the vicinity thereof, under the rights pretended to have been acquired in the Oil King and Standard Oil placer locations, while the plaintiff was in the actual, uninterrupted and peaceable possession of the tract of land in controversy, including the said right-of-way in the vicinity thereof.

IV.

That the Court erred in holding that the ground between the shores of the Pacific Ocean and the northerly boundary of Terminal Tract No. 1B constituted a canyon, pass or defile in a railroad or other physical sense.

V.

That the Court erred in holding that the approval of the plaintiff's definite survey for the first twenty miles did not constitute an approval of the whole right-of-way, together with the Terminal Tract No. 1B, on the said definite survey set forth and indicated.

VI.

That the Court erred in holding that the possible loss and damage to the defendants was a material consideration in denying the said injunction, while the plaintiff was in the actual, peaceable possession of the property in controversy, and the defendants had taken no steps to procure an adjudication of the right to encroach thereon, but were threatening to engage in a forcible violation of plaintiff's possession and rights in and to the property in controversy.

VII.

That the Court erred in holding and ruling that the burden was on the plaintiff to show such a condition of affairs as would not only justify but *"compel"* the Court to grant the injunction sought for.

VIII.

That the Court erred in admitting in evidence, over the objection of the plaintiff, and in overruling the objection of the plaintiff thereto, the sixth paragraph of the agreed statement of facts, containing that certain telegram purporting to be signed by R. A. Ballinger, commissioner, reading as follows: "Plat terminal sites 1A and 1B, Controller Bay, Alaska Pacific Railway & Terminal Company, not approved. Approval March 18 affects road line only. Map preliminary location Copper River & Northwestern accepted April 17. No definite location referred to. R. A. Ballinger, Commissioner."

IX.

That the Court erred in refusing the interlocutory order and in denying the injunction *pendente lite* against the defendants and each of them in this cause.

ARGUMENT.

I.

The first error specified above is the twenty-eighth assignment of error in the record, and the question raised by this assignment is so clear and so broad that a determination of the same in favor of the appellants in this cause (we take it) will finally dispose of the appeal without the necessity of investigating the other questions raised in this court. The Court in its opinion (see record, p. 325), ad-

mits that the defendant, the Copper River & Northwestern Railway Company has not complied with the railroad act of May 14th, 1898, or as construed by the Supreme Court of the United States in the case of *Washington & Idaho Railroad Co. vs. Coeur d'Alene Railroad Co.*, 160 U. S. 77, and in this connection the Court uses the following language:

"The defendants do not show in their evidence that they have any right to build from Katalla under their corporate organization. That announces that they intend to build from Valdez, a distant point, instead of which they are now constructing their road from Katalla."

The Court further says, in this connection, and as a reason, we suppose, for denying the injunction (Record, p. 325):

"That both sides are building roads without a formal corporate organization fully completed."

There is no evidence in the record in this case to sustain this assertion insofar as it applies to the plaintiff corporation's having complied with the railway act applicable to Alaska. In the agreed statement of facts, section 1, (see record, p. 278), it is shown that the original articles of incorporation of the plaintiff company contained no statement of the Yukon River or interior terminus of the plaintiff company, and that for this reason, and following the law as laid down in the Washington & Idaho R. R. Co. case above cited, the commissioner of the general land office on the 12th of February, 1906, rejected the application to file the original articles of the plaintiff company. The last sub-paragraph of section 1 of the agreed statement of facts, however, shows that the plaintiff company had complied with the law in this respect long prior to the time when the Copper River & Northwestern Railway Company

even considered establishing a terminus on Controller Bay. The last paragraph of the statement of facts above referred to is as follows:

"On February 24, 1906, amended articles of incorporation of the Alaska Pacific Railway & Terminal Company, complying with the requirements of the foregoing decision of the secretary of the interior were filed in the office of the secretary of state of the State of Washington, and on April 6th, 1906, a certified copy of said amended articles were filed with and accepted by the secretary of the interior."

So that the state of facts bearing upon the discussion raised by this specification of error is as follows:

Plaintiff railway company had duly complied with the requirements of the law in respect to defining its line of road in its articles of incorporation, had thereafter had its preliminary surveys accepted for filing by the land office, and had thereafter had its definite survey for its first twenty miles of road made upon the ground some three months prior to the preliminary survey of the defendant railway company. This definite survey of plaintiff was subsequently filed in the land office, and it was duly approved by the honorable secretary of the interior prior to the approval of any maps or plats of the defendant railway company. Plaintiff company was in the actual, peaceable possession of the property in controversy, engaged in constructing its line of road, when it was notified that the defendant railway company intended to forcibly enter upon the most important portion of its road, to-wit, the tract of ground abutting on the shores of the Pacific Ocean which of necessity must constitute its terminal yard, and lay a line of track across the terminal yard in the center thereof, without any attempt whatever at condemnation or other judicial process authorizing this entry. Thus, in order to avoid the consequences of physical conflict, plain-

tiff railway company was forced by the defendant to take the initiative in the judicial proceedings to prevent the defendant railway company from accomplishing something which, it must be conceded, it could not have accomplished by judicial measures, either condemnation or otherwise, owing to the fact that it had not complied with the law with reference to defining the line of road in its articles of incorporation. The defendants' answer in this case alleges that they have complied with this law, but the proof before the Court is to the contrary. The defendant, after stipulating in the agreed statement of facts that the plaintiff's definite survey had been approved by the Secretary of the Interior over the ground in controversy, answers and justifies its action in crossing the ground in controversy by the statement that it is engaged in constructing a line of railway pursuant to the laws of the United States applicable to Alaska with reference to railway companies; and if there is any defense whatever for the forcible intrusion, it is based upon the answer that they are constructing a line of railroad across the ground in controversy in a lawful and proper manner, and that they have a right to construct the same.

In the case of *Washington & Idaho Railroad Co. vs. Couer d'Alene Railroad Co.,* 160 U. S. 77, the plaintiff caused a survey to be made of a line of road on the ground in controversy at a date prior to the survey or construction of the defendant's line of road over the ground in controversy; but at the time the survey of the plaintiff company was made, its articles of incorporation had not been amended so as to include within the line of road the ground in controversy. In fact, the ground in controversy was situated at a point beyond the then designated terminus of the plaintiff company as shown by its articles of incorporation. This survey, however, was approved by

the Secretary of the Interior, and the Supreme Court in this case held that the plaintiff company could acquire no rights whatever which would relate back to the date of the survey on the ground, for the reason that the plaintiff company was not so organized as to authorize the construction of a line of railroad upon the ground in controversy, and in this connection the Court uses the following language:

"The argument on behalf of the plaintiff is that when, on December 22, 1886, the Washington & Idaho Railroad Company had filed its articles of incorporation and proof of orgaaniztion in the office of the Secretary of the Interior at Washington, D. C., it had a right to adopt the survey previously made by Burrage, as and for the location of its route under the general right of way act, and that when it so adopted said survey it related back to the date when the survey was made.

"We are unable to accept such a view of the law, but concur in the conclusion of the court below that the language of the act of congress, under which both parties claim, wherein it provides that 'the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, which shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road,' plainly means that no corporation can acquire a right of way upon any line not described in its charter or in its articles of incorporation; that it necessarily follows that no initiatory step can be taken to secure such right of way by the survey upon the ground or otherwise; that *until the power to build the road upon the surveyed line was in a proper manner assumed by or conferred upon the plaintiff company, its acts of making surveys were of no avail; and that, so far as the conflicting rights of the parties to this controversy are concerned, the status of the*

plaintiff is the same as if its survey of October 28, 1886, *had not been made."*

The portion of the quotation above italicized was copied by the Surpeme Court from the opinion of Judge Gilbert, rendered when the case was before the Circuit Court of Appeals, reported in 60 Fed. 986.

A similar question was presented in the case of *Utah N. & C. R. Co. vs. Utah C. Ry. Co.,* 110 Fed. 879, and at page 892 of the opinion Judge Hawley uses the following language:

"It must be borne in mind that, at the time the parties plaintiff and defendants entered upon the possession of the roadbed, neither corporation, plaintiff or defendant, had adopted any definite line or survey upon which its road was to be built. The facts are that complainant adotped its definite line of survey by a resolution duly passed by its board of directors on May 9, 1901, and the San Pedro, Los Angeles & Salt Lake Railroad Company adopted its definite line of route upon which it was to construct its railroad at a directors' meeting held May 22, 1901. The rights of the respective parties, upon this branch of the case, do not depend upon the question of prior possession of either party upon any particular part of the roadbed or right of way, either for the purpose of making a survey or doing work thereon. Neither party could gain any right by a possession obtained, or sought to be held, by force or violence. Whatever work was done was performed at their peril. In my opinion, it is wholly immaterial which corporation, through its officers, servants, or employees, first put foot upon the soil in dispute. The legal machinery controlling any right to the roadbed or right of way obtained by the surveys, or by possession, could not be set in motion until the corporation claiming the right of way had by corporate acts definitely adopted the line upon which its road was to be built. This is an essential act to be performed in order to enable the corporation to exercise the right of eminent domain under the

statute. Rochester H. & L. R. Co. v. New York, L. E. & W. R. Co., 110 N. Y. 128, 17 N. E. 680; Southern Pac. R. Co. vs. U. S., 109 Fed. 913; Railroad Co. v. Blair, 9 N. J. Eq. 635, 643, 645; Sioux City & D. M. R. Co., v. Chicago, M. & St. P. R. Co. (C. C.), 27 Fed. 770, 774; Johnston v. Callery, 184 Pa. 146, 151, 39 Atl. 73."

In the above case Judge Hawley enjoined the defendant from entering upon or in any way interfering with the right of way in the possession of the plaintiff company, which company had complied with the law with reference to defining its right of way previously to the defendant.

See also *Boca & L. R. Co. v. Sierra Valleys Ry. Co.,* 84 Pac. 298, from the Supreme Court of California. The plaintiff railway company sought to condemn a right of way across the line of the defendant railway company at a point not within the description of plaintiff's line of road as evidenced by its articles of incorporation. After the commencement of the condemnation suit the articles of incorporation of the plaintiff company were so amended as to include within the description of its line the property sought to be condemned. Under the Civil Code of California it was provided that the articles of incorporation of any railroad must state the place from and to which the road is intended to be run. The Constitution of the State of California provided that every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, and the Court, in passing upon the question involved, uses the following language:

"(a) Upon the first proposition the answer is that at the time the amended complaint was filed plaintiff was not authorized by the then articles of incorporation to maintain this action as to the west crossing. Section 297 of the Civil Code provides that 'a copy of any articles of incorporation filed in pursuance of this chapter, and certified by the Secretary of State, or by the county clerk of

the county where the original articles shall have been filed must be received in all courts of this state and other places, as prima facie evidence of the facts therein stated.' But when received they are but prima facie evidence. Plaintiff contends that 'the articles could properly be amended, after suit brought, so as to more particularly state and designate the line of the spur tracks or branch lines. The only effect of the amendment,' it is said, 'was to particularize that which before had been general,' and was 'not the creation of a new cause of action.' But none of the preceding articles—neither the original nor the first amended articles—made any mention of this particular branch, and the corporation was by them clothed with no power to condemn rights of way over this west branch route. The third amended articles were not, therefore, 'in aid or explanation of a right already existing when the action was commenced.' No such right then existed, and we do not think a corporation can begin an action to condemn a right of way along a particular route which it has not included in its articles of incorporation, and be permitted to support the complaint by subsequently amended articles which include this omitted route. Plaintiff's right to condemn is to be measured by the powers possessed by it at the time the action was commenced. The action was premature as to the west crossing. The corporation took its existence by virtue of its original articles; the amendments added nothing to its corporate entity except to enlarge its purposes, and these purposes went no further than to provide for the branches designated. There was no effort to further amend the complaint when the last amended articles were offered in evidence, if it be admitted that such amendment would have been allowable. Cases arising under Section 299 of the Civil Code, such as California Sav. & L. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525, and the recent case of Ward L. & S. Co. v. Mapes (Cal.), 82 Pac. 426, do not apply. The provisions of Section 299 relate to the filing of the articles in counties where the corporation is doing business, and may be waived by failure to raise the objection by proper plea (Id.); but here the objection was timely, properly made, and went to the existence of the

power to do the thing in question. A corporation can exercise no other powers than such as are specifically granted, or such as are necessary for carrying into effect the powers granted. As to any given act, the inquiry is, first, whether it falls within the powers expressly enumerated in the certificate; or, second, whether it is necessary to the exercise of the enumerated powers. Vandall v. S. S. F. Dock Co., 40 Cal. 88. The claim that the west branch was necessary to the expressed objects of the corporation cannot be maintained, for the enumerated powers included only the construction of the main line of plaintiff's road and east branch. The third amended articles brought the west branch within the corporate scheme, but it came too late to avail plaintiff under its previously filed complaint.

"(b) The claim that plaintiff was a de facto corporation, and as such could maintain the action, is equally untenable. Plaintiff confuses the question of corporate existence with corporate power. The corporate existence was alleged and admitted; no question of de facto corporation arises. The allegation of the complaint is 'that plaintiff is a railroad corporation, duly incorporated, organized and existing under the laws of the State of California,' and this averment is admitted. The question is one of power alone, and we know of no such thing in law as a de facto power. There is such a thing as the exercise of power by a de facto corporation. The corporation in condemnation proceedings acts as the agent of the state. The power to condemn may be delegated by the state, through legislative act, to any corporation or individual who shall comply with the terms upon which the right is given. Moran v. Ross, 79 Cal. 159, 21 Pac. 547. No one questions the right of a corporation duly organized under the laws of the state to condemn rights of way over lines of road stated in its articles as required by Section 291, Civ. Code; but it cannot exercise this power as a duly organized corporation and at the same time exercise like power as a de facto corporation over branch or other lines of road not stated in its articles. Plaintiff cannot exist as a corporation and condemn the east crossing, as we have held it could, and

in the same action ignore its de jure or statutory entity and claim the right to condemn the west crossing as a de facto corporation. Whatever its powers may be to condemn, they cannot exceed those given by its charter. It would be strange, indeed, if, as a corporation de jure, it could not condemn under its charter, and yet could do so as a de facto corporation. It has been held that a de facto corporation cannot exercise the right of eminent domain (10 Am. & Eng. Ency of Law, p. 1058), a point upon which we express no opinion, for whether this be true or not, we do not think a corporation can act simultaneously in the dual capacity of corporation de jure and a corporation de facto. Throughout this entire proceeding plaintiff has admitted as much; for it has amended its complaint and its articles so as to show a statutory corporation, and has not, except for purposes of argument, claimed to be a defacto corporation. There is an obvious distinction between a challenge to the corporate existence and a challenge to the power which may be exercised by the corporation, whether it be a de facto or de jure corporation. In the former case the general rule is (with exceptions) that the corporate existence may not be attacked collaterally; but it has always been held that the ultra vires acts of the corporation may be thus challenged, often by the corporation itself. And this rule would apply as well to a de facto corporation as to one de jure."

"6. It is contended by the plaintiff that by virtue of Article 12, Sec. 17, of the Constitution, Section 1238, Subd. 4, and Section 1242, Code of Civil Procedure, and Section 1001, Civil Code, every corporation and every individual owning and engaged in the construction of a steam railroad is in charge of a public use, and, seeking to acquire property for such use, immediately becomes an agent of the state, clothed with sovereign power. The argument is that the Constitution says that 'every railroad company shall have the right with its road to intersect, connect with or cross any other railroad,' and this does not mean 'every railroad company incorporated for this or that purpose shall have the right,' but that 'every railroad company,' without distinction, may cross every other railroad; that

the code provides (Section 1001, Civ. Code) that 'any person seeking,' etc., is 'an agent of the state,' or a 'person in charge of such use,' etc., and hence 'we must look to the purposes for which the corporation is seeking to acquire the property, and not to the declarations in the articles of incorporation, for the test of the right to exercise the sovereign power of eminent domain.' In the first place, the section of the Constitution referred to is not self-executing in the sense plaintiff would apply it. To condemn land, a railroad company is to be governed by general law as in the exercise of other powers. It may be doubted whether the Constitution states a right which, without it, the railroad company would not have under the statute. In any event, the Constitution would not authorize the taking of land by a railroad corporation regardless of its charter powers and regardless of the statute providing for condemnation. In the next place, we cannot agree with plaintiff that the purpose for which the corporation is seeking to acquire property is all controlling, and that the declaration in the articles of incorporation furnishes no test of the right to condemn for any particular purpose. Suppose the charter was for a street railroad in a city, and the corporation conceived the purpose of extending its system into the country by a steam railroad. Would the fact that it was 'seeking' to do this thing be sufficient to confer the right to condemn? Here, and always, the charter measures the powers of the corporation which are such as the legislature gives it, and are not coextensive with the powers of the individuals who compose it; it can lawfully exercise such powers only as are expressly or impliedly conferred by its charter. If the charter states the purpose to be to construct a railroad by a designated route, the purpose is limited to that route substantially as designated. The limitations of the charter cannot be circumvented by the corporation's assuming to be a 'person seeking to acquire property for any of the uses mentioned' in Section 1238, Code of Civil Procedure; the charter ever remains the measure of power. Nor, as is claimed, can the power here sought to be exercised be sustained as incidental to the powers expressly given. The branch road now under consideration was in

no sense incident to the main line, nor was it an appendage or adjunct such as is referred to in Section 465, Subd. 4, Civil Code. It was necessary for the purpose of opening contributory business and reaching new territory, but it was not necessary or incident to the operation of the main line."

"Plaintiff cites In re Johnson, 137 Cal. 119, 69 Pac. 973, and People v. Stephens, 62 Cal. 209, in support of its contention that every railroad has the right to cross any other railroad (Const., Art. 12, Sec. 17), that this is not a right to condemn a right to cross; and that this right is absolute; the duty of the Court being only to determine the amount of compensation and the point or manner of crossing. These were cases arising in cities in relation to the right to lay pipes in the streets for the supply of water or illuminating light, under Section 19, Art. 11 of the Constitution. It was held that the privilege of laying pipes for the purposes mentioned 'is expressly granted by the section of the Constitution cited, subject to the direction of the superintendent of streets or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof;' that the section is 'a direct grant from the people to the persons therein designated of the right to lay pipes in the streets of a city for the purposes specified, without waiting for legislative authority.' The distinction between the two provisions of the Constitution, however, is obvious. In granting the use of streets which are highways and subject to the control of the state, there is no taking of private property for public use; it is but devoting the highway to a use additional to that to which it is usually put, and consistent with that use. In the other case there is involved the taking of private property which, it must be presumed, is to be taken in consonance with that other provision of the Constitution, that 'private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any

corporation other than municipal until full compensation therefor be made, * * * which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.' Article 1, Sec. 14. 'Property appropriated to public use' is private property (Code Vic. Proc., Sec. 1240), and to condemn a right of way by one railroad over the right of way of another railroad company is the taking of private property for public use (Memphis & Charleston R. R. Co. v. Birmingham, Sheffield & Tennessee R. R. Co., 96 Ala. 571, 11 South. 642, 18 L. R. A. 166); and must be done, if at all, under the provisions of law regulating eminent domain."

From the foregoing it is clear that the Copper River & Northwestern Railway Company could not have come into court in the condition in which its articles of incorporation were at the time of this hearing, and secured, by way of condemnation, the right of way which they sought to secure across the terminal tract and the surveyed portions of the road, and that the only way in which they could lay a track across the ground in controversy was by means of a forcible entry, which the plaintiff was compelled to try to prevent by this application for an injunction. We submit, therefore, that on the 18th of March, 1907, when the definite survey of the plaintiff company was approved by the Secretary of the Interior, it vested a present title in the plaintiff, and the right of way included within one hundred feet on each side of its main line of railway from Inner Martin Island for the first twenty miles, and also vested title to the Terminal Tracts 1 A and 1 B, indicated upon said line of definite survey, so approved. The attempted crossing of the defendant company encroached both on Terminal Tract No. 1 B and on the right of way. The defendant railway company had no right whatever to be constructing a line in the neighborhood of Controller Bay, and its encroachment upon the right of way and ter-

minal tract of the plaintiff company was an unauthorized trespass, which should have been immediately restrained during the pendency of this action.

II.

THE DEFENCE THAT THE PROPERTY INCLUDED WITHIN THE EXTERIOR BOUNDARIES OF TERMINAL TRACT NO. 1B WAS PLACER OIL GROUND, AND THAT THE DEFENDANT RAILWAY COMPANY HAD SUCCEEDED TO THE RIGHTS OF THE ORIGINAL LOCATOR, IS NOT SUSTAINED.

The questions involved in the above proposition are raised by the assignments of error numbered in the record ten, eleven, thirteen, fourteen, fifteen and thirty-one. The assignments of error above referred to, all except thirty-one, refer to the admission of certain evidence sought to be introduced by the defendants and admitted over the objection of the plaintiff. It appears from the evidence in this case that in the month of December, 1901, W. A. Abernethy, acting for himself and eight others, filed location notices for two "association" claims of 160 acres each, denominated in his notice of location respectively the "Oil King" and "Standard Oil" placer locations. Abstracts of title showing these location notices, and showing that one M. W. Bruner and one John Olds had conveyed their undivided two-eighths to the Alaska Petroleum & Coal Company were introduced at the hearing. Abstract of title showing a conveyance in March, 1907, at or about the time the defendant railroad company announced its intention of crossing the property in controversy, of a blanket right of way across all lands then owned by the Alaska Petroleum & Coal Company, constitute what the defendant railway company has dignified as its chain of title, upon which is based its claim of right to cross the property in contro-

versy, although it had never been in possession of the property, and was not in possession of it at the commencement of this action. The introduction of these deeds was objected to by the plaintiff on the ground that no discovery had been proved (see Record, pp. 97, 98). We call the Court's attention to the only place in the record where the question of discovery was touched upon. Clark Davis, in his affidavit, states "that before purchasing the claims for the company the affiant had conversations with W. A. Abernethy and others of the original locators of the petroleum claims, and was informed by each of them that before locating the same a discovery of petroleum was made upon each of said claims, such discovery consisting of strong seepages of petroleum, oil and gas from crevices and depressions in the rock covering the surface thereof." We submit that even at an interlocutory hearing the Court ought not to permit evidence in the nature of hearsay as to the discovery and mineral character of the ground to be adduced, particularly where it is introduced for the purpose of casting a cloud upon the title of a railroad company actually engaged in construction, whose terminal maps upon the ground had been a matter of public record for some two years previous, and particularly when the railroad company seeking to forcibly cross the ground appears in court vested (if such a word could be used under the circumstances) with the title of only two of the undivided eighth interests, which title they had procured only at the last moment before the institution of this action.

See *Steele vs. Tanana Mines R. Co.*, 148 Fed. 678, which was a case in the Circuit Court of Appeals, Ninth Circuit. This case was brought before the same judge who sat at the hearing from which this appeal is taken. It was a suit brought in which the plaintiff sought to enjoin the Tanana Mines Railway Company from crossing a certain placer

mining claim which had been located by him, as he claimed, prior to the location of the survey of the railway company. In that case the judge in the court below held the parties strictly to the rules of the Supreme Court, announced in the recent decision of *Chrisman vs. Miller,* 197 U. S. 313, and in affirming the decision of the lower court the Circuit Court of Appeals for the Ninth Circuit held, in effect, that evidence showing that plaintiff had prospected the ground, and in so doing panned it frequently, with the result in most instances that he secured colors of gold, and in some instances fairly good prospects of gold, and where another witness was hired to prospect the claim and testified that the result of his panning showed colors of gold in each instance, and many of such pans showed what miners and prospectors are in the habit of calling good prospects of gold,—was not sufficient evidence of discovery. In passing upon the question this Court used the following language:

"The sum and substance of this evidence is, not that gold had been discovered on the claim in such quantities as to justify a person of ordinary prudence in further expending labor and means with a reasonable prospect of success, but that colors of gold had been found which were fairly good prospects of gold."

There is no evidence that such a discovery was had upon the ground, and we submit that in this case the defendant railway company is in a far poorer position to claim in good faith that it has proved a discovery than Steele, the plaintiff, was in the case above cited.

In the case of *Chrisman vs. Miller,* above cited, the Supreme Court of the United States held that it was not sufficient proof of discovery where the locator testified that he walked over the land at the time he posted the notice of location and discovered indications of petroleum, or that

"he saw a spring and the oil comes out and floats over the water in the summer time when it is hot; * * that he saw oil with water dripping over a rock about two feet high."

We submit (a) that there was no competent evidence of any discovery of oil whatever. It was only hearsay. (b) That if the hearsay evidence were admitted it would not constitute sufficient evidence upon which the Court could predicate at this hearing any probability of the defendants' having made, in truth and in fact, a discovery of oil within the meaning of the ruling of the Supreme Court in Chrisman vs. Miller.

However this may be, it is clear from the evidence of the defendants themselves that these claims had long since lapsed for failure to do assessment work. It is true that the affidavits of Clark T. Davis (see record, p. 291), and Henry R. Harriman (see record, p. 259), contain the following general statement:

"That during each and every year since the location of said two claims the annual assessment work required by law has been done and performed thereon, and that the said two claims are now valid, subsisting mining claims."

We submit that at the hearing of this cause the Court should not have allowed to be read in evidence, over the objection of the plaintiff, any such general statements, which are no more or less than conclusions of law, and in the making of which the obligation of an oath would have no practical, binding effect. The evidence of Hampton, the chief engineer for the plaintiff company, and of Morrison, is definite and specific on this subject. They say (see record, pp. 123, 231) that there is no seepage of oil or indication of oil upon the ground in controversy; that they have examined the same with reference to this question, and

that there are no known seepages of oil within three miles of the property in controversy. They state in their affidavits that no improvements whatever have been placed upon this ground since they first saw it in 1905 which would have a tendency to develop the ground for oil or other mineral purposes; and to meet these assertions, which go into detail and show just exactly what improvements have been put upon the ground, the defendant company placed upon the stand its chief engineer, M. K. Rogers. In his direct examination he stated (see Record, p. 67) that the Alaska Petroleum & Coal Company had about $25,000 of oil prospecting machinery with which they had been boring for oil around Katalla for the past three or four years; but on cross-examination he said that he did not know whether there was oil on the ground in commercial quantities, and that the well to which he referred as at present being driven by the Alaska Petroleum & Coal Company was about two miles from the property in controversy, and that in the whole district there was one well about six miles from the property in controversy which was producing twenty barrels of oil a day. (See record, pp. 86, 87.) A series of blanket affidavits of labor were introduced, showing assessment work from 1902 to the year 1905, inclusive, but no affidavit is in evidence in this case as to the performance of any annual labor during the year 1906, or during the current year of 1907, except the general statement above quoted from the affidavits of Clark Davis and Henry R. Harriman. The evidence in the case plainly shows that since June, 1906, when the plaintiff company erected its engineer camp upon the ground in controversy, no one has been in possession of the property other than the plaintiff company. The evidence of the chief engineer and manager of the plaintiff company clearly shows that no claim had ever been made

by the Alaska Petroleum & Coal Company to the right to the possession of the property in controversy until within a few weeks before the commencement of this suit, although it had been a notorious fact for two years, in the vicinity of Katalla, that the property in controversy was to be the Pacific Ocean terminus of the Alaska Pacific road. (See affidavits of Morrison and Bruner, record, pp. 14, 209,230.) There was no testimony before the court at the hearing in this case other than the naked allegations in the pleadings and in the affidavits, unsupported by any detail, that the Alaska Petroleum & Coal Company had ever been in possession of the property in controversy. It is a well-known principle of law that in injunction suits ordinarily the person in possession and in the enjoyment of property will not be deprived of the possession and enjoyment pending the litigation, except in very serious cases. It is also the well-settled rule of law taht the courts are inclined to protect the possession of any person who is and has for some time previous to the institution of the suit, been in the actual and peaceable possession of property, and the courts will look with disfavor at any attempt at ouster of a peaceable possession under any claim of title which is not merely colorable. (See recent articles of Henry Wade Rogers, Dean of the Law Department of Yale University, on Injunctions, 22 Cyc. of L. & P., p. 823, from which the following quotation is taken:)

"A defendant in possession will not be enjoined from the use of the property in controversy unless it is made to appear that complainant will thus lose the fruits of his action at law if he establishes title. * * * One in possession of land under a claim of title which is not merely colorable may maintain a suit for an injunction to protect his possession pending litigation as to the title to the property, when dispossession would result in irreparable injury, or where the remedy at law is inadequate; and, as

ancillary to a suit in equity, an injunction may be granted to protect possession, in cases in which the complainant would be entitled to the relief if ultimately successful."

It is apparent, from the trend of the decisions of this court with reference to important matters of right in Alaska, that this court is inclined to favor the maintenance of the status quo of any property as the same exists at the inception of the litigation.

See *Tonnanses vs. Melsing,* 106 Fed. 775; 109 Fed. 710, out of which case finally resulted the commitment of the judge and a number of officers of the court of the Second Division, District of Alaska, for assisting in a conspiracy to oust the original possessors of certain mining claims at Nome. We do not think that there was sufficient evidence in the record to justify the court in finding that the title of the plaintiff was at all doubtful. It certainly was entitled to 100 feet on each side of its right-of-way from Inner Martin Island for the first twenty miles. It had properly initiated, some two years previously, its application for the forty acres included within the exterior boundaries of Terminal Tract No. 1B. The definite survey upon which these terminals were indicated had been duly approved. It may be true that the separate plat of the terminals had not been actually endorsed by the secretary of the interior, but it appears from the letter of the honorable commissioner of the general land office introduced in evidence herein (being plaintiff's exhibit 6, record, p. 375), that there were no objections to granting the right-of-way to terminal tract No. 1B. The letter was written on the 28th of April, 1906, a year previous to the beginning of this controversy, and it appears from this letter that the plat was simply held in the land office for final action, which should have been taken at the same time the secretary's approval was endorsed upon the definite

survey. Even if it should be held that the actual endorsement of the secretary's signature upon this separate plat was necessary in order to complete the title of the company therein, we submit that the courts in the meantime will protect the prior locator of the terminal tract in his possession, and protect him from disturbance owing to that additional provision in the railway act of May 14, 1898, section 8, which reads as follows:

"And in all conflicts relative to the right-of-way or *other privilege* of this act, the person, company or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right."

This language, we submit, obviates any question which may arise from the holding of Judge Ross in the case of *Lilienthal vs. Southern California Ry. Co.*, 56 Fed. 701, decided some five years before the passage of the railway act referred to, under the provisions of the old act of 1875, in which he holds that the title to station grounds does not relate back further than the date of the actual approval by the secretary, and in which he states that in that particular case the general doctrine with reference to the acquisition of public lands, to-wit, that the first in time in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be the first in right, does not apply.

The position in which the defendant railway company places itself with reference to their claim of title under this oil business is this: They come into court, in defence of this injunction suit, saying that the plaintiff should not be protected in the possession of its right-of-way or terminal tract because they have an undivided two-eights of an easement across the property in controversy. To have appeared with this defense alone, and with the claim that the Alaska Petroleum & Coal Company has for some four

or five years past performed the assessment work upon the oil claims in controversy, in which it only owns an undivided five-eighths interest, and without advertising the other interests out for failure to perform their proportion of the assessment work, should, we think, have led the Court to the conclusion that this claim of title purchased immediately before the suit was commenced was an afterthought and that the defense on this ground was not made in the best of faith. It is a well settled principle of law that a deed will not support an easement held by tenants in common unless each and every one of the tenants in common join in the deed. There is no such thing as an undivided fraction of an easement, and upon this subject we cite:

17 Am. & Eng. Ency. of Law (2nd Ed.) 684, article Joint Tenants and Tenants in Common, in which the following language is used:

"The general principle that one tenant in common of land cannot convey any title to a specific part of the land as against his cotenants is applied also to the grant of any specific right or easement in the common property. One tenant in common, or any number of tenants less than all, cannot create or convey and easement in the property held in common. This rule has been several times applied to grants of mineral rights in common lands, and it is held that one tenant in common of land and the mineral rights therein cannot as against his cotenants separately convey his mineral rights, or grant to a stranger the right to dig ore or other mineral from the land. But where a cotenancy exists only as to the mineral rights in land, and does not extend to the land itself, one cotenant may convey his undivided interest in the ore estate."

"One tenant in common cannot convey his undivided interest in the common property with a reservation to himself of a specific right or interest therein, for this would be in effect an attempt to create in his grantee a special estate open to the objections just considered. Thus it is

held that a reservation, in a conveyance by one tenant in common of his undivided interest in land, of a right-of-way over such land is void. So also a reservation of his interest in the mines in and upon the land granted is void."

We also cite Freeman on Cotenancy and Partition, p. 245, Sec. 185, (1st Ed.) 1874, which reads as follows:

Sec. 185. *Cotenants Cannot Create an Easement*—As a tenant in common cannot make a grant of any specific part of the common land, which will convey any title against his cotenants, it follows that he cannot grant any right or easement upon any specified portion so as to confer any right capable of successful assertion against the other owners. This rule is equally true whether an easement or right-of-way be claimed as a way of necessity, or as founded on an express grant. If a grantor convey lands from which it is necessary that the grantee shall have a right-of-way over other lands of the grantor, the law presumes that it was the intent of the parties that such right-of-way should be given, and the grantor will therefore be compelled to give it. But if the lands over which the right-of-way is claimed belong to others as cotenants with the grantor, they cannot be prejudiced by a presumed *intent* in which they did not participate. And so where it is claimed that a highway has been dedicated by the acts of the owners, it must be shown that all of the cotenants participated or concurred in those acts."

If, however, for the sake of the argument, it should be assumed that the oil locations were valid and the defendant company had received a conveyance of the easement from all of the locators; or, if we go further and assume that the oil locations had ripened into patent, and the owner of the fee thereof had made the conveyance of right-of-way to the defendant company, and such conveyance had been made at the time the conveyance relied upon in this case was in fact made, which time in fact was long subsequent to the survey on the ground of terminal tract

1B, and long subsequent to the filing for approval of the map thereof with the secretary of the interior, and long subsequent to the preliminary survey of the first twenty miles of the plaintiff company's road, and subsequent to the filing with the secretary of the interior of the plaintiff company's map of definite location of the first twenty miles of its road; nevertheless we submit that the defendant company would not, even under such a state of facts, have acquired any right of priority to make use of such right-of-way so attempted to be conveyed to it, in so far as the same covers or touches the terminal tract 1B.

In this connection we again refer the Court to the language of the act of Congress (last sentence of Sec. 8 of the act approved May 14, 1898,) hereinbefore referred to, which reads as follows: "And in all conflicts relative to the right-of-way or other privilege of this act, the person, company or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right."

Under the provisions of Sec. 4 of the same act, any railroad company which may have acquired priority of right by priority of survey, over a competing railroad company, is granted the right to subject "private lands or possessory claims on lands of the United States" to its public uses, and the filing of the map of preliminary survey subjects such lands to the right of condemnation for such uses.

In the absence of such statutory provisions and under general principles of law, as established by the uniform decisions of the courts, as between two competing railroad companies, the right to subject lands in private ownership to the public use belongs to the company which takes the first step, either by filing map of location or by actual survey of the ground, and, as between such competing railroads, land in private ownership is deemed devoted to the

public use of the railroad first in time of location or survey to such an extent that the other road cannot, by first instituting condemnation proceedings or by acquiring a right-of-way over such lands by purchase, deprive the other of the right to devote such lands to public use by condemnation proceedings. The leading case upon the subject is *Sioux City* (etc.) *R. R. Co. vs. Chicago* (etc.) *R. R. Co.*, 27 Fed. Rep. 770. In that case the Chicago company surveyed and staked its right-of-way in June, 1885, over an 88-acre tract of land owned by one Camp. In August of the same year the Sioux City company purchased the said land from said Camp and wife and took conveyance thereof by warranty deed. It is squarely held that at the time the Sioux City company made the purchase and took the conveyance the land was, as between the two competing companies, subject to the right-of-way of the Chicago company, and the temporary injunction which had been issued upon the motion of the Sioux City company, restraining the condemnation proceedings instituted by the Chicago company in 1886 in respect of said land, was dissolved, the court holding that, notwithstanding the fact that the Sioux City company had purchased the land for its railroad purposes, nevertheless the Chicago company had, by its location in June, 1885, of its line over said land, acquired the prior right, as between the two companies, of subjecting said lands to its public use.

So, in this case, the plaintiff company, having surveyed its terminal tract 1B, and having filed map thereof for approval, and having made the preliminary and definite surveys of its right-of-way thereover many months prior to the conveyance made by the oil claimants to the defendant company, acquired by such survey and location by the statute (and would have acquired had there been no statute) the prior right over the defendant company to pur-

chase by condemnation said terminal tract, and also its right-of-way thereover, and the conveyance taken by the defendant company was taken and is held subject to this priority of right of the plaintiff company to devote this property to its public uses. All that is required of the plaintiff company is that, having acquired such priority of right to devote to its public use, it shall prosecute its further surveys and construction with reasonable diligence; and the evidence in this case shows clearly the exercise of the utmost diligence on the part of the plaintiff company in that behalf.

How much stronger plaintiff's case is here. The land is public land of the United States; it has been filed upon by oil locations without discovery; assessment work has not been kept up; the defendant company claims by purchase only an undivided five-eighths of an easement for a right-of-way over the ground in controversy.

III.

THE COURT ERRED IN RULING THAT THE GROUND IN CONTROVERSY CONSTITUTED A CANYON, PASS OR DEFILE, AND FURTHER ERRED IN HOLDING THAT IT WOULD NOT BE NECESSARY FOR THE DEFENDANT RAILWAY COMPANY TO CONDEMN ITS CROSSING BEFORE ATTEMPTING TO ENTER UPON THE PROPERTY IN CONTROVERSY.

This question is raised by the thirtieth and thirty-second assignments of error. The language of the railway act of 1898 is as follows:

"Sec. 3. That any railroad company whose right-of-way, or whose track or roadbed upon such right-of-way, passes through any canyon, pass or defile, shall not prevent any other railway company from the use and occu-

pancy of said canyon, pass or defile for the purposes of its road in common with the road first located, or the crossing of other railroads at grade."

The language is identical with the language of the railway act relating to right-of-way over public lands of 1875.

See *Denver & R. G. Ry. Co. vs. Denver, S. P. & P. R. Co.,* 17 Fed. 867, in which it was held that the clause in the act of 1875, reading as above indicated, was not self-executing, but that the company having the prior right-of-way may enjoin intrusion thereon by another company, until the facts are shown making it necessary for the second company to go on the right-of-way. In this case the second company (the defendant) filed a cross-bill, in which it asked leave to proceed during the pendency of the action and construct through the Grand Canyon, along the right-of-way of the plaintiff, subject to the final adjudication upon the bill; and in this connection the Court uses the following language:

"What was said by counsel about the hardship that rests upon the defendant may be entirely correct. I suppose it is, but I think it is not a matter for which the court can give relief by preliminary order. The plaintiff in this action has secured this right-of-way by going upon it and building its road under the act of Congress, and I think it has a right to defend that right-of-way against all who may seek to convert it to their own use, until the condition of things mentioned in this act of Congress is shown to exist; and no court has the power to direct any other road to go upon such way until the facts are ascertained. They are to be ascertained according to the usual methods of proceeding in courts of equity." (See p. 870.)

"Now, whenever a controversy arises between two companies in respect to the existence of such a necessity, the fact that the canyon, pass or defile is such that it is impracticable for the second company to pass through it without going upon the territory of the road first located

will enter into the controversy, and it must be settled by the courts. It is perfectly plain that the first company has got a right to object to the intrusion upon its right-of-way by the second company until that question is settled. If it were true that this act would subject the way to the use of any other company in such a manner that the latter might go in against the objection of the first, it would be also true that the second company could demand of the first the use of its track absolutely without adjudication of the facts in any court; but it seems to me as clear as anything can be that the first company, to locate its road through any such place as is described in this act of Congress, may, in the first instance, and without showing any cause whatever, object to admitting any other company into its way until the facts are shown making it necessary for the second company to come on the right-of-way to build its road. In that view, the circumstance that this suit was brought by the Rio Grande against the Denver, South Park & Pacific Company to enjoin it from intruding on its right-of-way, (the Rio Grande company having first made its location and constructed its road), is not material." (See p. 868.)

We desire to cite again the case previously cited, of *Boca & L. R. Co. vs. Sierra Nevada Ry. Co.*, 84 Pac. 299, where it was held that the provision in the constitution of the State of California similar to the provision in the above quoted act, allowing crossings, is not self-acting, and did not give to the company seeking to cross the right to select a place of crossing or the right to cross without a condemnation and judicial determination upon the subject. To same point, see also: *Montana, etc., R. R. Co. vs. Helena, etc., R. R. Co.* (Mont.), 12 Pac., page 916. The following is the holding of the Court as accurately expressed in the syllabus of the opinion, (and an examination of the case will show that the Montana railroad law in this respect is very like the United States statute under consid-

eration in the Rio Grande case above cited, and the statute under consideration in this case):

"Where one railroad company, duly authorized, has built its road-bed, and obtained its right of way and grounds for station buildings, machine shops, sidetracks, etc., through a defile or canyon, the court will grant an injunction in its favor, restraining another arilroad corporation, authorized to build to the same point, from going upon or interfering with the track or right of way of the corporation first in possession until an adjustment of rights can be made by the court under the general railroad law.

"One railroad corporation is not empowered, under the general railroad act, to be the judge of the necessity of the taking or using the road-bed or right of way, built or secured by another railroad company through a canyon or defile, but the necessity is a question for decision in the district court of the county in which the canyon is located."

Therefore, we submit that the court below erred in holding that it was material whether the land in controversy constituted a canyon, pass or defile or not, and should have prevented the defendants from intruding upon the property in the possession of the plaintiff, or upon the right-of-way theretofore granted by the secretary of the interior to the plaintiff until after the defendant railway company had followed the only process recognized by the law, viz., that of proceedings in court to condemn an easement over prior-acquired rights of the plaintiff by application to the court for that purpose. However, in this connection, we desire to discuss the facts with reference to the so-called canyon, pass or defile. From the photographs introduced in evidence, and the maps, it appears that the terminal tract No. 1B extends from the Pacific Ocean back to the northward, a distance of approximately a quarter of a mile. It appears that the northeast corner of this ter-

minal tract No. 1B is located upon ground approximately 90 feet in height. (See record, p. 131.) It appears that the defendant company at the same time was engaged in excavating to the westward of this property a cut 70 feet in depth. It appears that from the northeasterly corner of the property in controversy the ground gradually slopes into the foothills of the coast range. It is claimed and stated by Mr. Rogers, the chief engineer for defendant railway company, that there is *ample room, immediately to the north of terminal tract No. 1B, upon which he suggests in his evidence the plaintiff company should construct its terminals, so as to obviate the inconvenience of conflicting with the proposed crossing of the defendant company.* (See record, pp. 52, 53.)

The testimony of Mr. Hampton, the chief engineer for the plaintiff, shows that the defendant company could readily, and without great additional expense, construct a line of railway from Palm Point or Katalla to the northward and around Terminal Tract No. 1B, obviating the deep cut which they are making immediately to the west of Terminal Tract No. 1B, and that at no place would the grade of such a route exceed one per cent. (See Hampton's testimony, record, pp. 122, 133; see plaintiff's map, showing feasible route around said terminal tract, being plaintiff's exhibit No. 2.) Mr. Rogers, in his testimony (cross-examination, record, pp. 82, 83), is unwilling to state whether the ground between the foothills to the north of Terminal Tract No. 1B and the shore of the Pacific Ocean is a canyon, pass or defile. He merely says that it constitutes all three in a railroad sense. In this connection we desire to submit Mr. Hampton's testimony, his map, and a photograph of the ground, which shows for itself the situation in this connection. The defendants' situation in this connection is so strained that its prin-

cipal witness and chief engineer will not say that the ground is a canyon, pass or defile in any other than a "railroad sense." (See record, p. 83.) It may be that the ground constitutes a canyon, pass or defile in a "Pickwickian sense," but we do not believe that it even constitutes a canyon, pass or defile in the strained phraseology of Mr. Rogers. The trial court, however, is taken up with this expression, and in his opinion practically admits that this is not a canyon, pass or defile in the common acceptation of the term, and uses the following language (Record, p. 322):

"It is apparent to the Court that they (plaintiffs) must go over the route they laid out, and I am not prepared to say that the Court would make an order compelling them to climb a hill of that kind instead of going through a cut on a proper grade. The conditions are such that after they go up the hill they would have to go down again, and they would have at least two miles of grade or more at one per cent. * * * Speaking from a *railroad standpoint,* a continuous rise of a few feet for a long distance may actually stop progress. It may be impossible to build a road over it, although it might not rise into mountain walls."

An examination of the photograph (plaintiff's exhibit 15) shows clearly that this is not a canyon, pass or defile.

IV.

THE COURT ERRED IN CONSIDERING THE DAMAGE WHICH THE DEFENDANT MIGHT EXPERIENCE FROM AN INJUNCTION IN THIS CASE AS COMPARED WITH THE DAMAGE WHICH WOULD RESULT TO THE PLAINTIFFS, FOR THE REASON THAT IT APPEARS THAT THE DEFENDANTS LOCATED THEIR LINE OF ROAD WITH FULL KNOWLEDGE OF THE PLAINTIFF'S PRIOR

LOCATION, BOTH AS TO RIGHT-OF-WAY AND TERMINAL, AND FOR THE REASON THAT THE TRESPASS OF THE DEFENDANT RAILWAY COMPANY WAS WANTON AND ASSUMED AT ITS OWN RISK.

The above proposition is raised by the general assignment of error, and by the twenty-fourth assignment of error. The facts in connection with this proposition are briefly these:

The defendant railway company, after having chosen its terminus at Valdez, Alaska, sent its chief engineer to Alaska to investigate all of the various railroad lines projected from tidewater into the interior of Alaska. The defendant M. K. Rogers, chief engineer for the defendant railway company, constructed a map showing the course and the various routes into the interior as contemplated by various companies, including, as he states in his evidence (see record, p. 46), the route of the plaintiff company. Mr. Rogers and the defendant company were thoroughly familiar then, before they made their preliminary survey, and before they determined to build from Katalla across the property in controversy, with the fact that the plaintiff company had established its terminal point upon the Inner Martin Island, and upon the mainland immediately north thereof, being the property in controversy. All these facts they have had knowledge of since early in 1906. (See record, p. 44.)

They have had ample time, if they desired to cross any of the property located by this plaintiff, and, if it were necessary for them, to have gone a mile east of this company's location, and then constructed across it, to have sought through the courts of Alaska a judicial determination of the damage which would have flown, and a condemnation of such crossing, as in law they were entitled to have. Instead of this they rested upon their physical ability to

cross, allowed nearly a year to elapse, and at the beginning of the working season of 1907 declared war upon the plaintiff company. They were brought into court, and when brought into court were unwilling to submit their rights and claims in the premises by way of a cross-bill. Their chief desire seemed to have been to have stayed out of court and settled the controversy physically. They claimed to have expended a great deal of money upon the faith that they could establish and maintain a crossing by force over the property in controversy. We submit, therefore, that the language of the Court in its opinion (see record, p. 324), is not appropriate to the situation as it exists in this case. It is as follows:

"The argument made by counsel for defendant appeals to me very strongly, that the damage to defendant would be great. It is stated that the defendant has five or six hundred men there at work. Both sides seem to be in good faith and vigorously at work building roads. The defendant has a large number of men working and a large amount of supplies on the ground and would be greatly damaged by an order of this Court preventing them from crossing this particular point of right-of-way at that place, and the damage would be so out of proportion to the damage done by crossing plaintiff's ground that it does not appeal to me as a matter of right. They have got to cross plaintiff's line somewhere to get out of their terminal, and if they go over the high grade suggested by the plaintiff they would still have to cross plaintiff's road, and the same condition would confront them at that point; the mere fact of their crossing plaintiff's road, established on grade, does not appeal to me as being such an injury as would justify this Court in granting the injunction. In other words, both companies are engaged in building a railroad, and I do not think the court ought to grant an injunction in this particular case, and I am not inclined to do it."

It has long been well established that even where a

company desiring to cross the ground of another company enters into appropriate proceedings to condemn such crossing, the courts will not ordinarily allow a crossing upon terminal grounds, and we apprehend that the reason why no cross-bill was filed in this case, and the reason why the defendant company felt called upon to carry out its policy by force and by the use of arms, arises from the fact that defendant is advised that no court would permit a condemnation of the proposed terminal yards adjacent to and immediately north of Inner Martin Island.

See *State ex rel. Portland & Seattle R. R. Co. vs. Superior Court of Whitman County,* 88 Pac. 201. This case, which was decided on the 9th of January, this year, was a case in which the plaintiff sought to condemn a right-of-way through the center of the yards and terminal grounds of the defendant, and in deciding the case the Court uses the following language:

"The petitioner contends that it has the right to arbitrarily select its place for crossing the main line and spur tracks of the prior company. It contends that the statute (Section 4335, Ballinger's Ann. Code & St.) authorizes such arbitrary selection. Whatever might be said of such a construction of the statute as applicable to the single and simple crossing of two main lines, it certainly should not be said that the statute was intended to give to a new locator the arbitrary power to select a route through the center of the yards and terminal grounds of a prior company, across the switch and storage tracks of the latter company, in such a manner as to seriously interfere with the usefulness of the tracks and grounds. Such an interference with previously established rights in the older locator, rights established and used for the benefit and service of the public, would be wholly unwarranted unless public necessity required such interference. Perhaps such right of arbitrary selection of a route may exist as against purely private property which is owned and used wholly for private purposes, payment of the full damage being

made, but it should not be so as to property which belongs to a public service corporation which has already been subjected to the service of a public use. In such a case the established rights of the prior locator should be considered, and, if the public necessities of the new locator can be reasonably as well served by another location, it ought not to be permitted to enter established grounds and cross a system of established and proposed tracks so as to seriously interfere with present traffic and with plans for future and increased traffic. If there should be no other reasonable route then, without doubt, the older locator would be subjected to the burden of the public necessities of the newer one. What may constitute another reasonable route must be a question of fact in each case, depending upon all the circumstances and the entire environment. Mere additional cost incident to another route would not necessarily and of itself show the route to be an unreasonable one. Again, the additional cost might be so great as to approximate a prohibtory amount and thus render another location an unreasonable one. All the facts and circumstances attending each case must be considered in order to determine whether there is or is not a reasonable public necessity for taking the property which is already devoted to a public use. In this case we think the evidence does not show such public necessity in favor of the route sought to be condemned. It is not enough that it would serve the mere convenience of one railroad company to appropriate land devoted to the prior use of another, but it must appear that it is reasonably necessary in order to aid the new locator to discharge its public service duties. 'We have, then, the finding of the master, based upon ample testimony, that the land in question was acquired by the appellant company for the uses of its road, and that the same is necessary therefor. Can it now be taken by another corporation for the same or a similar use? It certainly cannot be done for the mere convenience or profit of the latter. To justify such taking there must be a necessity; a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the

corporation has no control; it must not be created by the company itself for its own convenience or for the sake of economy.' Sharon Railway Company's appeal, 122 Pa. 533, 17 Atl. 234, 9 Am. St. Rep. 133. See also *Barre Railroad Co. v. Railroad Companies,* 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. Rep. 877; *Rutland Canadian R. Co. v. Central Vermont R. Co.,* (Vt.) 47 Atl. 399; *Seattle & Montana Ry. Co. v. State,* 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. Rep. 866; *State ex rel. Spokane Falls & Northern Ry. Co. v. Superior Court,* 40 Wash. 389, 82 Pac. 417. The above authorities fully sustain the decision of the trial court under the facts in this case, and the decisions cited from this court we think are squarely in point. The judgment is therefore affirmed."

This ruling has been applied in a number of cases to ground which has been acquired with the intention of using the same for terminal yards, even where not actually so used at the time condemnation is sought.

See *State ex rel. Spokane Falls & Northern Ry. Co. vs. Superior Court of Spokane County,* 82 Pac. 417, in which the Court uses the following language in speaking of the authority of one road to cross another:

"But this implied authority only extends to the taking of so much of the right-of-way of the first company as can be spared without material detriment. The question is, 'whether the new condemnation can be made without destroying the use and usefulness of that part of the first-acquired right-of-way which is in actual use, or so obstructing or hindering or embarrassing it as to render it unsafe.' * * * And the same rule prevails with relation to the taking of lands used for depots, yards, shops and other appurtenances. * * * The Court finds, and the testimony positively shows, that the International Railway Company had not obtained any more terminal facilities than it needed, nor as much; that it would be crowded for room; that it could not obtain any more room on the north by reason of its close proximity to the Oregon Railway & Navigation

Company's terminal grounds, nor on the south by reason of the river. Hence, if this testimony was true, the taking would simply be relieving one company at the expense of another, and no authority, we think, would grant a condemnation of the property of one railroad by another for such alleged reasons."

"It is true that the International Railroad is not yet in operation, but the testimony shows that a large portion of the grading has already been contracted for, and that the whole road will be in operation in the near future; that it has traffic relations with the Canadian Pacific, and expects to be in reality the western portion of a transcontinental road. Although it is not yet in operation, companies of this kind must procure grounds for terminal facilities before they commence their operations. The necessity of the business requires this, and when once they make their calculations to procure these facilities, which this company did at an expense of $150,000 in purchasing this land, they will be protected in those terminal rights to the same degree as will a company which is already operating its road. This rule was laid down by this court in a case recently decided *Nicomen Boom Company v. North Shore Boom & Driving Co.,* 82 Pac. 412. The Court in that case, after reviewing the law in relation to railroads and finding that railroads are analogous to boom companies, they both being corporations for public service, said: 'Applying the rule followed in the railroad cases, appellant had the right, after filing its plat of location, to acquire the title to the lands within the limits of its location. It was an absolute right, which it could enforce by condemnation proceedings to the exclusion of any other boom company that might seek to appropriate the same land. It did acquire these lands, not by condemnation, but by purchase. Having thus established its location and acquired the necessary lands, it proceeded to construct its boom, but did not construct it throughout the entire located territory, although it has always intended to do so as the public demand might require. We think in reason that the appellant had the right, when it filed its plat of location and acquired property for the purpose of constructing its boom,

to take into consideration the future requirements of its business, and that it should not be restricted merely to the territory required at the time its first works were erected. It would seem that this must be so, in view of the obligations appellant assumed as a public service corporation.'

"The lower court in this case, after stating certain matters which were proven in its findings of fact, says: 'The foregoing facts, taken in connection with all the facts and testimony in the case, convince me that the petitioner is not acting in good faith in this matter, but is endeavoring to harass and impede the work of the defendant company, or, at the least, that the building of the line in question is an afterthought. The petitioner could build a line, making the connection it desires, by running to the north of the Oregon Railway & Navigation tracks and the Union Depot grounds aforementioned. The line thus proposed would be but a trifle longer, and it does not appear that it would involve prohibitive expense. None of the officers of the petitioning company or of the Great Northern appear to have endeavored to inform themselves upon the feasibility of this line. The same connection likewise could be made at slightly increased expense by crossing the Spokane River from the old Spokane Falls & Northern depot to a connection with the Great Northern, and thus by way of Havermale's Island. The cost of building additional bridges and a slightly increased amount of trackage is the only objection to this course, except that the terminal grounds of the Great Northern are said already to be congested. Save for this latter objection, too, the connection could be made over the lines of the Great Northern from Hillyard to Havermale's Island, and thence across the north fork of the river to the Seattle, Lake Shore & Eastern track. The only increased expense thereby would be the building of one bridge across the north fork of the river. I am unable to find any necessity for the building of the proposed track. I do find, however, that it would render impracticable the use of the proposed terminal grounds by the defendant, and that it has and can acquire no other terminal grounds near the business part of the city.' We think the whole testimony justifies this state-

ment by the Court. But if only the last part of the statement were true, that it would render impracticable the use of the proposed terminal grounds by the defendant, and the defendant could acquire no other terminal grounds, that would be proper grounds upon which to deny the application.

"We think, under all authority and in accordance with just dealing, from a review of the whole record, the judgment of the lower court should be affirmed. It is so ordered."

See appeal of Sharon Railway, 17 Atl. 234 (Pa.), which was a case in which one railway company sought to condemn a right-of-way across the terminal yards of another. In this connection the Court uses the following language (see page 235) :

"The land in question was acquired by the appellant company in entire good faith several years before this controversy commenced for the purposes of a yard. I do not understand this fact to be disputed. It is true the learned judge below was of opinion that a portion of the tracks in the yard were not constructed until about the time this bill was filed, and that 'the primary purpose in their construction was to obstruct the building of the defendant's branch.' We cannot adopt this finding in the sense in which the court below put it. The delay in building these tracks is accounted for by the poverty of the company. The master distinctly finds the fact that the land was acquired by appellant in 1874 and 1875, 'for the purpose, and with the intent, of locating its distributing yard there for the accommodation of the business of its road and branches, and the land so acquired is conveniently located, well suited and necessary to enable the plaintiff company to economically and expeditiously carry on its pursuits and prospective business.' Under such circumstances, the precise time when its tracks in the yard were laid is not material. We have, then, the finding of the master, based upon ample testimony, that the land in question was acquired by the appellant company for the uses of its road,

and that the same is necessary therefor. Can it now be taken by another corporation for the same or a similar use? It certainly cannot be done for the mere convenience or profit of the latter. To justify such taking there must be a necessity—'a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control. It must not be created by the company itself for its own convenience, or for the sake of economy.' Pennsylvania Railroad Co.'s appeal, 93 Pa. St. 150. To the same effect is Pittsburg (etc.) Railroad Co.'s appeal, *supra*. I will not stop to discuss or vindicate this rule. It is settled law, and rests upon sound principles. The cases of Western Pennsylvania Railroad Co., 99 Pa. St. 155, and Northern Central Railway Company's Appeal, 103 Pa. St. 621, have no application. They were cases of grade crossings, under the act of 1871."

See also the case of *Rutland-Canadian R. Co. vs. Central Vermont R. Co.* (Vt.) 47 Atl. 399, and *Barrie R. R. Co. vs. Railroad Companies*, (Vt.) 17 Atl. 923.

In fact, it seems to have been in years past, from the number of cases reported upon the subject, a favorite pastime among competing railway companies to seek to break up the integrity of the terminal and switch yards of their competitors. But according to the authorities in the appellate courts, particularly those recently rendered, the application of the doctrine of eminent domain to the crossing of terminal yards seems to have become prohibitively unpopular with the courts, even though popular with some railroads.

The testimony in this case, we submit, plainly shows that the crossing of Terminal Tract No. 1B, in the manner proposed by the defendant railway company, would render the tract useless. (See affidavits of Morrison and Bruner, and testimony of Hampton, record, pp. 20, 22, 160, 16.) In fact, it is not necessary to argue from any statement made

in the evidence on this subject. It is apparent that the one natural, feasible place for the construction of a wharf without great expense such as would probably involve public appropriations for breakwater, is on the plaintiff's terminal at Inner Martin Island, and that it is necessary to have a tract on the mainland immediately north of Inner Martin Island for the maintenance of yards and all necessary terminal structures. That there is no other place to put these is apparent, unless the contention of Mr. Rogers (record, pp. 52, 53), that there is ample ground to the north of it upon which terminals could be constructed. If this contention be correct, the defendant company and not the plaintiff should take advantage of it and construct its single line of railroad from that point instead of making the plaintiff move all of its terminal facilities back upon that ground to accommodate the convenience of the defendant company. When a yard situated immediately in conjunction with plaintiff's wharf site is cut in the middle by a transverse crossing, it is apparent to any man, whether he be an engineer or not, that the value of that yard for terminal purposes is entirely destroyed. It is well established that the court will refuse to consider the comparative loss or inconvenience to the defendant where his action has been wanton and unprovoked.

See article of Henry Wade Rogers on Injunctions, 22 Cyc. of L. & P. 783, and cases there cited.

In this connection, and at this time, we desire to call the attention of the court also to what we conceive to be an erroneous statement of the law contained in the opinion of the court (record, pp. 315, 316):

"The complaint alleges that the plaintiff company has acquired rights in those terminal grounds by filing its map under the statute of May 14, 1898, and that it has acquired such a title and right to the property as *compels* this court

to restrain the defendants from building across it. The burden, of course, is upon the plaintiff to show to the court such a condition of affairs as would not only justify but *compel* the court to do so over the protest of the defendants."

The authorities which we are just about to cite in this brief are to the effect that where any wanton violation of the rights of another party appears to have taken place, the injunction will be granted without respect to the damage and loss which will occur to the violator of those rights. But in the course of these opinions, there are a number of quotations which show that an injunction is not sought for as a matter of grace, but as a matter of right. We have taken the rule to be, not as stated by the learned judge below, but to be this: Where any plain violation of right is shown to have taken place, or to be about to take place, from which it would appear to the court from the standpoint of a reasonable and discreet person, constituted the taking of an unfair advantage over the plaintiff, then the discretion of the court was so appealed to that the court should act and grant the injunction. We do not believe that it is within the power of parties or counsel to adduce in any case such an unequivocable state of facts as would come within the meaning of any rule announced which contained in it the word "compel."

In the recent case of *Pittsburg & S. W. R. Co. vs. Fiske,* reported in 123 Federal 760, and decided by the Circuit Court of Appeals for the Third Circuit. The statement of the rule governing the forcible violation of possession, where a person is in possession under color of title, is so succinctly and briefly stated that we take the liberty of copying the opinion, which is as follows:

"This is an appeal from a decree awarding an injunction restraining the plaintiffs in error 'from interfering

with or in any manner obstructing the use of the switch in controversy.' This switch, and the land upon which it was laid, were in possession of the plaintiff below, under at least a *prima facie* title, when the defendants, without license or authority of law, placed an engine and cars upon it, and so prevented the plaintiff from using it as he desired to do. This was a trespass, and the act of the injured party in repelling it, by removing, with such force as was requisite, the intruding rolling stock from the switch, was legally justified. Therefore no weight can be accorded to the first proposition submitted by the plaintiffs in error, as follows:

"'The writ of injunction in this case should not have been issued, for the reason that it was used to enable the plaintiff to maintain a position acquired by him through force, and not the position that existed several days previous to the granting of the injunction.'

"The status which it was the duty of the court to maintain was that which actually and rightfully existed when the injunction was applied for, and not that which the defendants had endeavored to wrongfully create.

"The second and third of the propositions of the plaintiff in error assume that the court below should not have granted an injunction without first and finally deciding the controversy respecting the title to the switch. This assumption is inadmissible. The plaintiff below was, as we have said, in possession, under a claim of right which was by no means merely colorable; and he was entitled to protection against interference with that possession until a superior title should be established, if it could be, in an appropriate action. The defendants were not entitled to determine that matter for themselves, as they had attempted to do, and the court was clearly right in prohibiting any renewal of that attempt.

"The fourth proposition of the plaintiffs in error is that the plaintiff below had a complete and adequate remedy at law. But in our opinion he had not. The proofs made it quite evident that the trespass which had been committed would, if not restrained, be repeated and con-

tinued; and it is well settled that under such circumstances an injunction may and should be awarded to secure plaintiff against probable irreparable injury, and for the avoidance of a multiplicity of suits.

"The assignment of errors need not be referred to with particularity, for the case of the plaintiffs in error has been submitted upon the several propositions to which we have adverted, as embracing 'all the reasons contained in said assignments.'

"The decree of the Circuit Court is affirmed, with costs."

In the case of *Jones vs. City of Newark,* 11 N. J. Eq. 457, although the injunction in that case was denied, the Court announced the following rule:

"I think the Court may judiciously lay down the rule that an injunction ought not to issue where the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, *unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences.*"

In the case of *Corning vs. Troy Iron & Nail Factory,* 40 N. Y. 205, the Supreme Court, in speaking of the doctrine of comparative injury, uses the following language:

"The question then comes to this, whether the defendant, who has wrongfully diverted from plaintiffs a stream affording such a water power, shall be permitted to continue such wrongful diversion, and thus to deprive the plaintiffs of what is clearly theirs without their assent, upon the ground simply that its restoration would be a great damage to it. In other words, that by its continuance wrongfully to appropriate to its own use the property of the plaintiffs it derives a much greater benefit than the plaintiffs could by being restored to their own. The bare statement of the question would seem to suggest the only

proper answer. The very idea of justice is to give to each one his due. The use of the natural flow of the stream is the due of the plaintiffs, and to justify withholding it from them requires some better reason than loss to the wrongdoer consequent upon its restoration."

In speaking on the subject of the doctrine of comparative injury as controlling the granting of an injunction, the Supreme Court of Pennsylvania, in the case of *Walters vs. McElroy,* 25 Atl. 125, uses very apt language, which we take the liberty of quoting:

"To extricate themselves from this difficulty the defendants say that the plaintiff's land is worth little, while they are engaged in a great mining industry which will be paralyzed if they shall be restrained from a continuance of the acts complained of, and that in equity a decree is of grace, and not of right; and, invoking the principle that a chancellor will never enjoin an act when by so doing greater injury will result than from a refusal to enjoin, they ask that the plaintiff be turned over to his remedy at law. The phrase 'of grace,' predicated of a decree in equity, had its origin in an age when kings dispensed their royal favors by the hands of their chancellors, but, although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws, as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace, of the chancellor. Certainly no chancellor in any English-speaking country will at this day admit that he dispenses favors or refuses rightful demands, or deny that, when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demanded *ex debito justitiae,* and needs not to be implored *ex gratia.* And as to the principle invoked, that a chancellor will refuse to enjoin when greater

injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing, to the hurt of another, that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him, as compared with the advantages that would accrue to the defendants from its occupation."

And the same court, in the case of *Evans vs. Reading Chemical & Fertilizing Co.*, 28 Atl. 702, at page 711 of the opinion uses the following language:

"Nor does equity defer the granting of relief until the complainant has been driven from his property, (*Fish v. Dodge*, 4 Denio 311,) or until his health has been destroyed, (*Walter v. Selfe*, 4 Eng. Law & Eq. 15, 22,) *or until somebody is killed.* (*Dennis v. Eckhardt*, 3 Grant, Cas. 393.) I may conclude with the words of Mr. Justice Thompson in the last-cited case as entirely applicable to the present one: 'I do not forget the admonition against using the strong arm of the chancellor, but that strength was given, and intended to be used in proper cases, and I think this is one of them as it now stands before us.'"

The same court, in the case of *Sullivan vs. Jones & Laughlin Steel Co.*, 57 Atl. 1065, at pages 1070 and 1071 of the opinion uses the following language:

"It is urged that as an injunction is a matter of grace, and not of right, and more injury will result in awarding than refusing it, it ought not to go out in this case. A chancellor does act as of grace, but that grace sometimes becomes a matter of right to the suitor in his court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace

than the law can deny protection and relief, if able to give them. This is too often overlooked when it is said that in equity a decree is of grace, and not of right, as a judgment at law. In *Walters vs. McElroy et al., supra,* the defendants gave as one of the reasons why the plaintiff's bill should be dismissed that his land was worth but little, while they were engaged in a great mining industry which would be paralyzed if they should be enjoined from a continuance of the acts complained of; and the principle was invoked that, as a decree in equity is of grace, a chancellor will never enjoin an act where, by so doing, greater injury will result than from a refusal to enjoin. To this we said" —(the Court then proceeds to quote that portion of the opinion in the case of *Walters vs. McElroy* previously quoted in this brief, and proceeds to say thereafter) :—"There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land. Though it is said a chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing and leaving the party to his redress at the hands of a court and jury, and if, in conscience, the former should appear, he will refuse to enjoin 'that it often becomes a grave question whether so great an injury would not be done to the community by enjoining the business, that the complaining party should be left to his remedy at law,' and similar expressions are to be found in other cases; 'none of them, nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in the possession and enjoyment of his property because that right is less valuable to him than the power to destroy it may be to his neighbor or to the public.' The right of a man to use and enjoy his property is as supreme as his neighbor's, and no artificial use of it by either can be permitted to destroy that of the other. To this rule, if at times there are apparently some exceptions, the present case is not one of them."

We also quote in full a short opinion rendered upon this same subject by Mr. Justice Holmes, who at that time was sitting upon the supreme judicial bench of Massachusetts. See

Lynch vs. Inst. for Savings, 33 N. E. 603.

"This is a bill in equity to restrain a threatened eviction of the plaintiff by the owner of the fee. The plaintiff is a sub-lessee who is found to be in under a lease which was assented to by the defendant's predecessor in title, and which is binding on the defendant. It does not expire until the end of November, 1895. The *mesne* lease has been surrendered. We are to take it that the plaintiff has been injured, and that he was threatened with complete eviction when the bill was filed. The only question intended to be presented by the report is whether the injunction should be denied, and the plaintiff confined to recovering his damages on the ground that the injury of the injunction to the owner would be incommensurate with the benefit to the plaintiff. The result of denying the injunction is 'to allow the wrongdoer to compel innocent persons to sell their right at a valuation.' *Tucker v. Howard,* 128 Mass. 361, 363. The decision in *Brande v. Grace,* 154 Mass. 210, 31 N. E. Rep. 633, is not an authority for that. There the defendant built a structure on its own land after a decision by the Superior Court that it had a right to do so. When the plaintiff's lease had but eight months more to run, this court decided that the structure was unauthorized because it interfered with an implication in the lease that the rooms should continue to open on Tremont Street; but an injunction was refused, in view of the early termination of the lease. In the present case the plaintiff's lease has a year and nine months to run. The defendant is not interfering with a doubtful easement under a mistaken view of its rights. Now, at all events, if not from the beginning, it simply is dispossessing, or trying to dispossess, a man of his land, by willful wrong; and its argument that it should not be restrained in proceeding must be that it can make more money out of plaintiff's property than the

plaintiff can, if it is allowed to take it. See *Goodson v. Richardson,* L. R. 9 Ch. App. 221, 224. If we are to infer although it does not appear with definiteness, that the defendant has been at some expense already on the plaintiff's premises, we see no reason to doubt that it has acted with knowledge of the plaintiff's rights. What it has done outside of the plaintiff's premises, and not interfering with him, is no concern of his. The defendant's outlay does not better its case on the question of a prohibitory injunction, and we see no reason why it should not be required to restore the premises to their original condition. See *Tucker v. Howard,* 128 Mass. 361. Injunction to issue."

We also invite the court's attention to the language of the Supreme Court of Michigan, in the case of *Ives vs. Edison,* 83 N. W. 120, in which the Court says (p. 122):

"Counsel say the proposition is universally recognized that an injunction will be issued, in the discretion of the court, only when there is threatened an irreparable injury, or a continuing trespass or injury which cannot be compensated by damages in a suit at law, 'and, in the exercise of this discretion, the court will examine into all the circumstances of the case, and if it is apparent that the relief sought is disproportionate to the nature and extent of the injury sustained, or likely to be,' or 'if the injunction will cost the defendant many times more loss than the complainant will suffer, the court will not interfere.'" (Citing a number of authorities.) "An examination of these cases will show that each of them differs in some essential particular from the case at bar. In some of them the easement was not a private one created by deed. In others the injured party, after knowledge of the proposed trespass, remained inactive, and allowed a large expenditure of money to be made before invoking the aid of the court. In each of them it was made to appear that it would be inequitable for the equity court to interfere. But what are the facts in this case? Mr. Ives bought a valuable piece of property, and, as a part of the purchase, he obtained an easement that he and his grantor regarded as

essential for him to possess. In the same deed which conveyed to him the title in fee to the store, there was granted to him the easement. The deed was promptly recorded, thus giving notice to the world of what his rights were. He entered upon the use of the easement, and continued to use it for nearly 13 years. The defendant Edison joined in the deed to Mr. Ives, and received part of the consideration paid therefor. The defendant May knew what the rights of Mr. Ives were. He sought to obtain his consent to a relinquishment of his easement. Failing to obtain this, with the consent of Mr. Edison he determined to take away the easement of Mr. Ives, and substitute another in the place of it. Learning of his disposition to do this, the complainant invoked the aid of the court. While the case was awaiting a final determination, the defendant saw fit to ignore the rights of the complainant, and to ignore the legal proceedings, and proceeded to remove the stairway and to substitute another in the place of it. To accomplish this wrong has cost the defendant a large sum of money. To restore the easement thus arbitrarily taken wis cost another large sum of money, the aggregate of which sums is so large that it is now said it will be entirely disproportionate to the injury done the complainant, and for that reason the court should not grant relief. If such a contention is to prevail, then indeed is the chancery court shorn of its power to protect persons in their right of property. If this doctrine is to be sanctioned, the person engaged in large enterprises may seize upon rights of less magnitude than his own, and, if an appeal is made to the law for protection, he may ignore the right of the injured and the pendency of the legal proceeding; and if he will put money enough into the new enterprise before a final decree is entered, so that it will cost him much more to restore the right he has wrongfully taken than a jury may regard the right as worth, he may prevent the entering of any decree whatever against himself, and may mulct the person who has appealed to the courts to protect his rights, in costs. This does not appeal to our sense of justice. The easement possessed by the complainant was created by

deed. It imposed a servitude upon Mr. Edison's land for the benefit of the estate of complainant, which, under the statute of frauds, could not be assigned, granted or surrendered, unless by a writing or by operation of law. Washb. Easem. (4th Ed.), p. 300. It was taken for granted by defendant May that he could not move this stairway without the permission of Mr. Edison, who was the owner in fee of one-half of it, but the title in fee was no more sacred than the easement held by the complainant, created by a deed for which payment had been made. It is difficult to avoid the conclusion that if the easement to which complainant is entitled can be taken without her consent simply because defendant May will be benefited more than she will be damaged, for a like reason the title owned by Mr. Edison may be ignored. It is doubtless true that the parties ought to have been able to arrive at an amicable agreement, but in the absence of such an agreement the defendant had no more right to remove this stairway than he would have had to trespass upon any other portion of complainant's estate in such a way as to deprive her of its use, and then say to her that he had provided for her another estate just as valuable, and with which she should be satisfied. I know of no law which will justify such an invasion of the rights of property belonging to one person, to serve the convenience or necessities of another. It is the duty of the courts to protect persons in their right of property, even though the holdings may be small, instead of justifying a trespass, or compelling the owner of the property to accept something else in the place of it. *Gregory v. Nelson,* 41 Cal. 278; *Ritchey v. Welsh,* 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105. In this case a definite agreement was made between the complainant and her grantors for the use of this easement in the place it was then located. It is for her to say whether the agreement shall be preserved in its integrity, and, before it can be changed, her consent must be obtained. *Dickenson v. Canal Co.,* 15 Beav. 271; *Hills v. Miller,* 3 Paige 253. In the case of *Stock v. Jefferson Tp.,* 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355, the same argument was used that is urged by the solicitors for the defendant in this case. The

Court said: 'It is the claim of the defendants that the loss to the complainant caused by the diversion of the water is trivial, while the damage the defendants would sustain if a permanent injunction is granted would be be very great, and that therefore the injunction ought not to be allowed.'" (Citing authorities.) "None of these authorities establishes the doctrine that, where one trespassed against acts promptly after notice of the trespass, equity will not interfere, where the trespass is of a continuing nature and is irreparable in its character. An examination of these cases will show either that it was doubtful if any damage would be done, or the complainant had not acted promptly in appealing to equity. It does not appeal to one's sense of justice to say that the exercise of a right possessed is not of as much benefit to the possessor as the taking of that right from the owner would be to the trespasser, and therefore the trespasser should be allowed to continue his trespass. The defendants knew the complainant was opposed to what they did. He forbade their acts, and when they continued them he caused a copy of a decree made more than forty years ago in favor of his grantors to be served upon them, and, when they paid no attention to all this, without unreasonable delay he appealed to the court. If they have expended considerable sums of money in committing this trespass it is their own fault, and they must lose it. It is urged very earnestly by counsel that Mr. Stock's right to maintain his dam and to use the water that would naturally come to his mill must give way to the right of the public to improve the highways, to drain lands, and to generally improve the country. It is sufficient reply to this argument to say that it has long been the fundamental law of the land that a man is not to be deprived of his property without due process of law and without compensation." (Citing authorities.) "The circuit judge should have granted the injunction as prayed. *It is doubtless true it will cost the defendant a good deal to restore to the complainant the easement as it existed when the suit was brought, but the defendant alone is to blame for the situation. All the work done in the removal of this stairway*

has been done since this proceeding was begun. The defendant preferred to act without waiting for the court to determine the controversy. In doing so he acted at his peril, and is justly chargeable with the consequences. He should be required to restore the easement as it existed when this bill was filed. A decree will be entered in accordance with this opinion, with costs of both courts."

It is apparent that plaintiff is forced into court, because defendant, who should have initiated proceedings, if any were necessary and proper, had not a case to submit to the court. It is apparent from the record that since the institution of the action, three physical encounters have been had in order to procure a crossing on the ground in controversy, and that the defendant company has finally been successful in effecting, after an armed conflict, such a crossing. We submit that this Court should not hesitate to give to the plaintiff company immediate relief, with as little delay as possible, and that a mandate should issue in this cause, not only directing the granting of the injunction originally applied for, but directing that the status quo of the parties be immediately restored.

The principal regret that we have in connection with this appeal is that the operations of the defendant company looking to a forcible crossing of this land were not made apparent early enough to secure a hearing on the application for an injunction in the lower court in order to appeal to this court at its May sitting in San Francisco.

Respectfully submitted,

HAROLD PRESTON,
SHACKLEFORD & LYONS,
F. M. BROWN,
Attorneys for Appellant.